Touro Law Review

Volume 11 | Number 2 Article 8

1995

# Calmer Seas: The Supreme Court's Major Criminal Law Rulings Of The 1993-94 Term

William E. Hellerstein

# CALMER SEAS: THE SUPREME COURT'S MAJOR CRIMINAL LAW RULINGS OF THE 1993-94 TERM

*Hon. Leon D. Lazer*:

Our next speaker is Professor William Hellerstein, from Brooklyn Law School, who has been a speaker at all six of our conferences. He is, in his own right, well recognized throughout the state. During my own service in the Second Department, I recall that while Hellerstein was the Chief of the Appeals Bureau at the Legal Aid Society, it was the best appellate operation, including the ones involving the District Attorney's Offices, in the various counties in the Appellate Division, Second Department. He has been nominated to be appointed a Judge of the New York State Court of Appeals by the New York State Nominating Commission. Is it seven or eight times?

*Professor William E. Hellerstein*:

Just four.

*Hon. Leon D. Lazer*:

My God, only four? I was nominated three times myself. It is only four so I am disappointed. I suppose I should not have asked. In any event, we are fortunate in that he has not been appointed so we can have him as a speaker at our conference. He is certainly, I think, one of the leading experts on Fourth, Fifth, and Sixth Amendment criminal law issues. He has many cases to deal with, so it is my pleasure to introduce him.

*Professor William E. Hellerstein**:

INTRODUCTION

Thank you, Judge Lazer. I always enjoy coming to Touro Law School to participate in this symposium. After hearing Professor Margulies, I feel very good. I had not perceived in the cases which he discussed as much gold as he found in them.

I would call this a "calmer seas" Term. But there were some notable features. I will first talk about the personalities on the current Court and some of the workload aspects of the Court before I get into the cases.

Among the noteworthy features of the Supreme Court's 1993-94 Term are that it produced the fewest signed opinions --eighty-four-- since the 1955-56 Term, as compared to 140 which the Court was averaging just a few terms ago. Additionally, the justices were noticeably less polarized than in recent years. Last Term there were twenty five-to-four decisions; this Term there were fourteen.[1] Also, the discourse among the justices appeared more pragmatic and less ideological.

This mellower ambiance was reflected in the Court's criminal law decisions. This is not to say that this Term was without interest or even excitement. The Court ruled on important issues as to police interrogation;[2] federal sentencing;[3] double jeopardy;[4] and jury instructions.[5] For a second consecutive year, the Court also showed that it would not be a compliant partner in government's use of civil forfeiture and other schemes in the war on drugs.[6] Also, the Court decided three cases involving the interpretation of

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1. *See* Marcia Coyle, *In Search of an Identity*, NAT'L L.J., Aug. 15, 1994, at C2.

2. *See infra* notes 21-81 & accompanying text.

3. *See infra* notes 82-137 & accompanying text.

4. *See infra* notes 158-230 & accompanying text.

5. *See infra* notes 231-55 & accompanying text.

6. *See infra* notes 138-57 & accompanying text.

federal criminal statutes as to intent,[7] the scope of the hearsay exception for statements against penal interest,[8] and the right of a defendant who asserts an insanity defense to have the jury charged as to the consequences of an insanity acquittal.[9] Lastly, although in a civil case, the Court placed gender on the same footing with race in the exercise of jury peremptory challenges;[10] a ruling with important consequences for criminal trials. As in the past, I again will not discuss the Court's capital punishment cases because we are still an abolition state. If the upcoming election changes that, I will request more time for my future presentations.

As to personalities, the 1993 Term had a number of intriguing facets. It brought to a close the remarkable tenure of Justice Blackmun, a jurist who, appointed by President Nixon to stem the Warren Court's liberalism, finished his twenty-four year tenure as the Court's most liberal member. Also, the Term saw Justice Souter continue his left-of-center leanings as he again infused his work with the erudition and intellectual depth that I remarked on last year.[11] It is these qualities that make Justice Souter a key member of the Court.[12]

With Justice Blackmun retired, Justice Souter may be his most likely replacement in what remains of the Court's liberal wing (a rather small space whose most frequent occupant, after Justice Blackmun, is Justice Stevens). Consider, that in contrast to Justice Ginsburg, a former ACLU attorney, "who voted almost as often with the Chief Justice as she did with Justice Blackmun in cases in which those two justices were on opposite sides," Justice Souter agreed with Justice Blackmun more than twice as often as he did with the Chief Justice.[13] It is important to also note that in the four habeas corpus cases last Term, Justice Souter voted for the prisoner

7. *See infra* notes 284-322 & accompanying text.

8. *See infra* notes 341-62 & accompanying text.

9. *See infra* notes 256-83 & accompanying text.

10. *See infra* notes 363-95 & accompanying text.

11. William E. Hellerstein, *Sotto Voce: The Supreme Court's Low Key But Not Insignificant Criminal Law Rulings During the 1992 Term*, 10 TOURO L. REV. 355 (1994).

12. *See* David J. Garrow, *Justice Souter Emerges*, N.Y. TIMES, Sept. 25, 1994, § 6 (Magazine), at 36.

13. *See* Coyle, *supra* note 1, at C3.

each time while Justice Ginsburg voted for the prisoner only twice.[14] In the previous Term, Justice Souter voted for the prisoner in four of six habeas corpus cases, giving him a two-year batting average for prisoners of .800.[15]

It is too early, of course, to predict Justice Breyer's direction. "Pragmatic" was the most frequent label given to him during the confirmation process.[16] His criminal law profile on the United States Court of Appeals for the First Circuit also reflects that assessment. Consequently, there is little basis to conclude that in criminal cases he will emerge left of Justice Souter. However, there is better than an even chance that he will be in Souter's company more often than not -- and that Justice Ginsburg will be there also. This creates a solid centrist core with Justice Stevens on the left flank and makes Justice Kennedy a justice to whom, in Arthur Miller's term, "attention must be paid."

As stated earlier, last Term, fourteen cases were decided by a five-to-four vote. Justice Kennedy was in the majority in thirteen of them.[17] He was followed by the Chief Justice and Justice Scalia, each of whom was in the majority in ten of the fourteen splits.[18] Least often in the majority were Justices Blackmun, Stevens and Ginsburg.[19] Thus, even if Justice Breyer or Justice Souter were to replace Justice Blackmun as the "house liberal," a fifth vote on that side of the aisle still would be needed.[20] Trolling for Justice Kennedy's vote by criminal defense counsel during the coming Term should make for interesting sport.

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14. *See* Coyle, *supra* note 1, at C3.

15. *See* Coyle, *supra* note 1, at C3.

16. *See, e.g.*, Joan Biskupic, *Breyer Belatedly Gets His White House Ceremony*, WASH. POST, Aug. 13, 1994, at A9.

17. *See* Coyle, *supra* note 1, at C2.

18. *See* Coyle, *supra* note 1, at C2.

19. *See* Coyle, *supra* note 1, at C2.

20. A word of caution is needed about Justice Blackmun's image in criminal cases; it is not accurate to consider him a "liberal." An examination of his decisions, dissents, and votes will not sustain it.

## I. CONFESSIONS AND POLICE INTERROGATION

In *Davis v. United States*,[21] the Court held that the police may continue questioning a suspect who makes an ambiguous request for counsel and that, while it may be "good police practice for the interviewing officers to clarify whether or not [the suspect] actually wants an attorney," the majority would not impose a requirement that clarification be sought.[22]

Davis, a sailor stationed at the Charleston Navy Base, was suspected of beating a fellow sailor to death with a pool cue stick and was eventually arrested by Navy investigators, given *Miranda* warnings, and signed a written waiver.[23] After he was questioned for about an hour and a half, Davis stated, "Maybe I should talk to a lawyer."[24] The investigators ceased questioning him about the murder but asked him questions seeking clarification as to whether he actually wanted a lawyer.[25] After the investigators attempted to clarify Davis' statement concerning a lawyer, Davis said he did not want to speak to a lawyer. The investigators then continued questioning Davis for another hour until Davis finally stated that he would not answer any more questions without a lawyer.[26] However, by that time, Davis had said enough to sink himself.

In *Edwards v. Arizona*,[27] the Court held that a suspect who waives his rights but then requests counsel at any time during interrogation may not be subjected to further police-initiated interrogation until counsel has been made available to him.[28] In the years since *Edwards*, courts have struggled with the question of ambiguous counsel requests. The predominant view, and that

21. 114 S. Ct. 2350 (1994).
22. *Id.* at 2356.
23. *Id.* at 2352-53.
24. *Id.* at 2353.
25. *Id.*
26. *Id.*
27. 451 U.S. 477 (1981).
28. *Id.* at 484-85. The Court also held that "when an accused has invoked his right to have counsel present during custodial interrogation, a valid waiver of that right cannot be established by showing only that he responded to further police-initiated custodial interrogation even if he has been advised of his rights." *Id.* at 484.

chosen by the Court of Military Appeals in *Davis*, approved the stop-and-clarify approach.[29] Although the government opposed Davis' argument for a bright-line rule that would trigger *Edwards* upon an ambiguous remark, it also asked the Court to reject a countervailing rule that would allow the police "to ignore any request for counsel but one articulated in precisely the right terms."[30]

Writing for a five-member majority, Justice O'Connor, not surprisingly, rejected both Davis' position and, quite surprisingly, the government's position, and held that, "after a knowing and voluntary waiver of the *Miranda* rights, law enforcement officers may continue questioning until and unless the suspect clearly requests an attorney."[31] Despite the acknowledgment that often it will be good police practice for the interviewing officers to clarify whether or not the suspect actually wants an attorney, the Court would not adopt a rule requiring the police to ask clarifying questions.[32] Thus, wrote Justice O'Connor, "[i]f the suspect's statement is not an unambiguous or unequivocal request for counsel, the officers have no obligation to stop questioning him."[33]

Justice Souter, joined by Justices Blackmun, Stevens and Ginsburg, concurred only in the decision to affirm Davis' conviction. Justice Souter insisted that the Court's *Miranda* jurisprudence mandates a broader interpretation of a suspect's request for counsel and that the stop-and-clarify approach, adopted by the Court of Military Appeals, is more consistent with that obligation and with the practicalities of "the real world."[34]

The majority's rejection of the narrower ground for affirmance, as espoused by the government, is yet another reflection of the Court's extremely crabbed view of *Miranda.* Once again we were

29. *Davis*, 114 S. Ct. at 2356. *See, e.g.*, Owen v. Alabama, 849 F.2d 536, 539 (11th Cir. 1988) (holding that officers must cease questioning of suspect and clarify with suspect whether suspect has unambiguously requested an attorney).

30. *Davis*, 114 S. Ct. at 2354.

31. *Id.* at 2356.

32. *Id.*

33. *Id.*

34. *Id.* at 2355 (Souter, J., concurring).

reminded that *Miranda* protections, including the prohibition on further questioning after invocation of the right to counsel, are prophylactic and not constitutional mandates. As Justice O'Connor emphasized, the *Edwards* rule serves only to ensure against police badgering suspects into waiving previously asserted *Miranda* rights and that

> when the officers conducting the questioning reasonably do not know whether or not the suspect wants a lawyer, a rule requiring the immediate cessation of questioning 'would transform the *Miranda* safeguards into wholly irrational obstacles to legitimate police investigative activity,' . . . because it would needlessly prevent the police from questioning a suspect in the absence of counsel even if the suspect did not wish to have a lawyer present.[35]

Justice O'Connor conceded that "requiring a clear assertion of the right to counsel might disadvantage some suspects who--because of fear, intimidation, lack of linguistic skills, or a variety of other reasons--will not clearly articulate their right to counsel although they actually want to have a lawyer present."[36] She discounted this, however, because the "primary protection" afforded by *Miranda* is the warnings themselves, and if a suspect waives his right to counsel after his rights have been explained, it is not too much to ask that the suspect affirmatively assert his desire for counsel before the *Edwards* safeguards become operative.[37]

Despite haling from the pastoral surroundings of New Hampshire, Justice Souter seems in greater touch with the realities of custodial interrogation than the majority is willing to admit to. He noted that criminal suspects, because of their backgrounds and the pressures they face, are "an odd group to single out for the Court's demand of heightened linguistic care."[38] More importantly, he noted that the majority's approach creates a "real risk" of endangering a Fifth Amendment protection.[39] If a suspect

35. *Id.* at 2355-56 (citation omitted).
36. *Id.* at 2356.
37. *Id.*
38. *Id.* at 2360 (Souter, J., concurring).
39. *Id.* at 2362 (Souter, J., concurring).

makes a statement he intends as an invocation of the right to counsel, but which his interrogator brushes aside as being insufficiently clear, the suspect "may well see further objection as futile and confession (true or not) as the only way to end his interrogation."[40] Justice Souter disputed the majority's conclusion that its decision was foreshadowed by its prior *Miranda* rulings and offered his own view that "[t]he concerns of fairness and practicality that have long anchored our *Miranda* case law point to a different response: when law enforcement officials 'reasonably do not know whether or not the suspect wants a lawyer,' . . . they should stop their interrogation and ask him to make his choice clear."[41]

A question that still remains open after *Davis* concerns whether the police need to seek clarification where a suspect's statements about remaining silent are ambiguous. But I doubt that the Supreme Court would treat the issue differently than it did Davis' ambiguous counsel request. The Eleventh Circuit, which had long followed the stop-and-clarify rule,[42] held recently, in *Coleman v.*

40. *Id.* (Souter, J., concurring).

41. *Id.* at 2359 (Souter, J., concurring) (citation omitted). An interesting sidelight to the decision was Justice Scalia's concurrence. He was perplexed by the government's avoidance of any reliance on the admissibility of confessions standard in 18 U.S.C. § 3501 that Congress, disaffected with cases such as McNabb v. United States, 318 U.S. 332 (1943) and Mallory v. United States, 354 U.S. 449 (1957), enacted in 1968. *Id.* at 2357-58 (Scalia, J., concurring). Section 3501(a) states that "a confession . . . shall be admissible in evidence if it is voluntarily given." 18 U.S.C. § 3501(a) (1985). Justice Scalia believed that the statute appeared to render *Miranda* "entirely irrelevant" in some federal cases. *Davis*, 114 S. Ct. at 2358 (Scalia, J., concurring). He served notice that, whether the government relies on the statute or not, he will insist on taking account of § 3501 "when a case that comes within the terms of this statute is next presented to us." *Id.* (Scalia, J., concurring).

42. *See* Owen v. Alabama, 849 F.2d 536, 539 (11th Cir. 1988) ("Any statement taken by the state after the equivocal request for counsel is made, but before it is clarified as an effective waiver of counsel, violates *Miranda*."); Martin v. Wainwright, 770 F.2d 918, 923 (11th Cir. 1985) ("Under *Miranda*, the police not only must give the suspect the now-familiar set of warnings, but also must scrupulously honor the suspect's right to cut off questioning.").

*Singletary*,[43] that the *Davis* rule should be applied to assertions of silence.[44]

The Supreme Court's other *Miranda* decision was not controversial and was disposed of by a *per curiam* decision. In *Stansbury v. California*,[45] the Court revisited the question of what constitutes "custody" under *Miranda* and held that "an officer's subjective and undisclosed view concerning whether the person being interrogated is a suspect is irrelevant to the assessment whether the person is in custody."[46]

Stansbury, an ice cream truck driver, was convicted for the rape and murder of a ten year-old girl.[47] Police suspicion focused initially on another ice cream truck driver.[48] After the police questioned him, they decided to question Stansbury. Four officers surrounded his trailer home and one knocked on the door. When Stansbury answered, he was told the officers were investigating a homicide to which Stansbury was a possible witness and he was asked if he would accompany them to the police station to answer some questions.[49] Stansbury agreed and rode to the station in the front seat of one of the police cars.[50]

At the station, Stansbury was questioned without being given *Miranda* warnings.[51] When Stansbury mentioned that he had driven a turquoise car, a fact that matched a witness' statement, the officer's suspicion was aroused.[52] When Stansbury next admitted to prior convictions for rape, kidnapping, and child molestation,

43. 30 F.3d 1420 (11th Cir. 1994). The Eleventh Circuit held that "[a] suspect must articulate his desire to cut off questioning with sufficient clarity that a reasonable police officer in the circumstances would understand the statement to be an assertion of the right to remain silent." *Id.* at 1424. Furthermore, the court held that where "the statement is ambiguous or equivocal, then the police have no duty to clarify the suspect's intent, and they may proceed with the interrogation." *Id.*

44. *Id.*

45. 114 S. Ct. 1526 (1994) (per curiam).

46. *Id.* at 1527.

47. *Id.* at 1528.

48. *Id.* at 1527.

49. *Id.*

50. *Id.*

51. *Id.*

52. *Id.* at 1528.

questioning stopped and *Miranda* warnings were administered.[53] Stansbury asked for an attorney and made no further statements.[54]

The trial court denied suppression of Stansbury's statements and its fruits, ruling that Stansbury was not in custody until he made his statement about the turquoise car, primarily because until that moment, the detective who interrogated him was focused on the other truck driver, and not on Stansbury.[55] The California Supreme Court affirmed, applying a "totality of the circumstances" test in which "no one factor is dispositive."[56]

Because the California court may have included in its analysis the subjective belief of the interrogating officer, the Supreme Court reversed and remanded for further proceedings. In a fair turnabout, the Court reiterated the point it had made in two prior decisions, *Beckwith v. United States*[57] and *Berkemer v. McCarty*,[58] in which it was the defendant who claimed that he was in custody because of the subjective beliefs of the police. The Court reiterated that, under *Miranda*, the test for custody is whether there was a formal arrest or restraint on freedom of movement of the degree associated with a formal arrest, and that the "subjective views harbored by either the interrogating officers or the person being questioned" are irrelevant; the "objective circumstances" control.[59]

In *United States v. Alvarez-Sanchez*,[60] the Court resolved an issue which, in certain contexts, affects the interrelationship

53. *Id.*

54. *Id.*

55. *Id.*

56. *Id.* The California Supreme Court set forth additional factors that were important considerations in determining the applicable legal standard, including "'(1) the site of the interrogation, (2) whether the investigation has focused on the subject, (3) whether the objective indicia of arrest are present, and (4) the length and form of questioning.'" *Id.* (citation omitted).

57. 425 U.S. 341, 344 (1976) (holding that a defendant who made incriminating statements in a private home without being given *Miranda* rights was not in custody for *Miranda* purposes).

58. 468 U.S. 420, 442 (1984) (stating that a police officer's subjective belief has no bearing on whether an individual is in custody at a particular moment and that the only question relevant to the court is how a reasonable person in the individual's position would have perceived the situation).

59. *Stansbury*, 114 S. Ct. at 1529.

60. 114 S. Ct. 1599 (1994).

between state and federal law enforcement authorities. The case concerns the scope of the federal statute that governs the admissibility of confessions in federal prosecutions.[61]

Section 3501 of Title 18,[62] to which I alluded earlier in my discussion of *Davis*, was enacted in 1968 by a Congress disaffected with both *Miranda* and the *McNabb-Mallory* doctrine that rendered inadmissible in federal prosecutions otherwise voluntary confessions obtained during presentment delay.[63] Subsection (a) of section 3501 states that in federal prosecutions "a confession . . . shall be admissible in evidence if it is voluntarily given."[64] Subsection (c) provides, however, that statements made within six hours following a defendant's "arrest or other detention in the custody of any law-enforcement officer or law-enforcement agency shall not be inadmissible solely because of delay in bringing [the defendant] before a magistrate."[65] Thus, there is the question of whether subsection (c), the safe harbor provision, was intended to be a limitation on subsection (a), so that any statement, although voluntary, made outside the safe harbor period, is nonetheless inadmissible.

In *Alvarez-Sanchez*, the defendant was arrested by Los Angeles County deputy sheriffs on state drug charges who found him in possession of counterfeit United States currency.[66] They held him over the weekend and called the Secret Service on Monday morning. Federal agents arrived, warned the defendant as to his

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61. *Id.* at 1600.

62. 18 U.S.C. § 3501 (1985).

63. *See* Mallory v. United States, 354 U.S. 449, 454 (1957) ("But [a defendant] is not to be taken to police headquarters in order to . . . elicit damaging statements to support the arrest and ultimately his guilt [without a prompt arraignment as stated in Rule 5(a) of the Federal Rules of Criminal Procedure]."); McNabb v. United States, 318 U.S. 332, 344-45 (1943) (holding that incriminating statements made by a defendant as a result of defendant's unlawful detention for two days in a barren cell without access to a magistrate, and subjected to questioning for five hours was in "flagrant disregard of the procedure which Congress has commanded [under Rule 5(a) of the Federal Rules of Criminal Procedure]").

64. 18 U.S.C. § 3501(a) (1985).

65. 18 U.S.C. § 3501(c) (1995).

66. *Alvarez-Sanchez*, 114 S. Ct. at 1601.

*Miranda* rights and secured a waiver. During the ensuing interrogation, the defendant incriminated himself.[67] The agents then took custody of the defendant, who was subsequently arraigned, indicted, and convicted of federal counterfeiting crimes.[68]

The Ninth Circuit ruled that section 3501's "arrest or other detention" language included time spent in state custody and that subsection (c)'s safe harbor period expired sometime before the defendant's statements to the federal agents.[69] The Ninth Circuit concluded that the statute precludes suppression under *McNabb-Mallory* of a confession given during the safe harbor period.[70] Nonetheless, despite subsection (a)'s focus on voluntariness, voluntary confessions made beyond the six-hour safe harbor period are excludable solely on the basis of pre-arraignment delay.[71]

The Supreme Court reversed in an opinion by Justice Thomas. Although the government argued that section 3501 was intended by Congress to supersede *McNabb-Mallory* completely and thus, a confession made beyond the safe harbor period is admissible if voluntary, the Court did not address that argument.[72] Instead, Justice Thomas construed the statute to excise the relevance of the defendant's time in state custody.[73] He concluded that "'arrest or other detention'" in section 3501(c) means an "'arrest or other detention' for a violation of *federal* law."[74] He noted that subsection (c) deals with "delay" in presentment.[75] That term, he emphasized, "presumes an obligation to act."[76] He thus reasoned that

67. *Id.* The respondent admitted that he had knowledge of the fact that the currency was counterfeit. *Id.*

68. *Id.* at 1601-02.

69. *Id.* at 1602.

70. *Id.*

71. *Id.*

72. *Id.* at 1603.

73. *Id.* at 1604.

74. *Id.* (citation omitted).

75. *Id.* at 1603.

76. *Id.* at 1603-04.

> there can be no 'delay' in bringing a person before a federal magistrate until, at a minimum, there is some obligation to bring the person before such a judicial officer in the first place .... Until a person is arrested or detained for a federal crime, there is no duty, obligation, or reason to bring him before a judicial official 'empowered to commit persons charged with [a federal] offense ....'[77]

Furthermore, Justice Thomas stated that "[a]s long as a person is arrested and held only on state charges by state or local authorities, the provisions of section 3501(c) are not triggered."[78] This is true, Justice Thomas observed, even if state arresting officials "believe or have cause to believe that the person also may have violated federal law."[79]

In a brief concurrence Justice Ginsburg, joined by Justice Blackmun, emphasized that "we do *not* decide today a question on which the Courts of Appeals remain divided: the effect of section 3501(c) on confessions obtained more than six hours after an arrest on federal charges."[80] In a separate concurrence, Justice Stevens expressed concern about possibilities for collusion between local and federal officials and stated that he "would not assume that section 3501(c) will never 'come into play' until a suspect is arrested on a federal charge."[81]

## II. SENTENCING ISSUES

In recent years, the Court's docket has contained a significant number of sentencing issues, many of which have arisen under the Federal Sentencing Guidelines. Last year was no different. In two cases, *Nichols v. United States*[82] and *Custis v. United States*,[83] the Court faced the question of when a defendant's past convictions could be used to justify a harsher sentence in the case at bar.

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77. *Id.* at 1604 (citation omitted).
78. *Id.*
79. *Id.*
80. *Id.* at 1605 (Ginsburg, J., concurring).
81. *Id.* at 1606 (Stevens, J., concurring).
82. 114 S. Ct. 1921 (1994).
83. 114 S. Ct. 1732 (1994).

In *Nichols*, the issue was "[w]hether the Constitution prohibits a sentencing court from considering a defendant's previous uncounseled misdemeanor conviction in sentencing him for a subsequent offense."[84] Resolution of the issue proved difficult as the Court ruled six-to-three for the government, with Justice Souter authoring a concurrence in which he disputed not only the majority's overruling of a prior decision but also its determination to reach the constitutional issues presented at all.[85]

In 1990, Nichols pleaded guilty to a cocaine conspiracy charge.[86] He also had a 1983 federal felony drug conviction and a 1983 state misdemeanor conviction for driving under the influence for which he was fined $250 but was not imprisoned.[87] Under the Federal Sentencing Guidelines, the misdemeanor conviction raised Nichols' Criminal History Category from category II to category III, which increased his sentencing range from 168-210 months to 188-235 months.[88] Nichols challenged the use of his uncounseled state misdemeanor conviction on Sixth Amendment grounds,[89] relying heavily on *Baldasar v. Illinois*.[90] The Sixth Circuit rejected his claim and affirmed his conviction.[91]

Chief Justice Rehnquist, writing for the majority, overruled *Baldasar* and held that imposition of prison time under a sentence enhancement scheme as a result of a prior uncounseled conviction is not the same as directly sentencing an uncounseled defendant to prison,[92] which is prohibited by *Scott v. Illinois*.[93]

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84. *Nichols*, 114 S. Ct. at 1924.

85. *Id.* at 1929 (Souter, J., concurring).

86. *Id.* at 1924.

87. *Id.*

88. *Id.*

89. *Id.*

90. 446 U.S. 222, 228 (1980) (per curiam).

91. United States v. Nichols, 979 F.2d 402 (6th Cir. 1992), *aff'd*, 114 S. Ct. 1921 (1994).

92. *Nichols*, 114 S. Ct. at 1927

93. 440 U.S. 367, 373-74 (1979) ("[T]he Sixth and Fourteenth Amendments to the United States Constitution require only that no indigent criminal defendant be sentenced to a term of imprisonment unless the State has afforded him the right to assistance of appointed counsel in his defense.").

*Baldasar* proved a weak foundation for a defendant such as Nichols. Baldasar had succeeded in persuading a majority of the Court that his uncounseled misdemeanor conviction should not be used to convert a second misdemeanor into a felony. However, the "holding" in *Baldasar* defied description. The case was decided by a *per curiam* opinion which contained no rationale of its own. Instead, it referred to "the reasons stated in the [three] concurring opinions," each of which sported a different rationale, with none commanding five votes.[94]

The Chief Justice Rehnquist did not try to sort out the *Baldasar* puzzle. Instead, he embraced Justice Stewart's *Baldasar* concurrence and Justice Powell's *Baldasar* dissent. Justice Stewart had concluded that *Scott* was violated because Baldasar's prior uncounseled conviction *automatically* triggered a prison term under Illinois' sentencing scheme.[95] Justice Powell had argued that under *Scott*, a sentence that was good when entered was available for later consideration in a sentence enhancement scheme.[96] Thus, as drawn by the Chief Justice, the line of demarcation was that between "criminal proceedings which resulted in imprisonment, and those which did not."[97]

Having selected this distinguishing fault-line, the Chief Justice found reliance on a prior uncounseled misdemeanor conviction well within traditional sentencing practices.[98] He noted that a sentencing judge may always consider a wide range of information from any source, including the defendant's criminal history, and that "courts have not only taken into consideration a defendant's prior convictions, but have also considered a defendant's past criminal behavior, even if no conviction resulted from that behavior."[99] The constitutionality of this practice, he observed, was sustained in *Williams v. New York*,[100] and in *McMillan v.*

94. *Baldasar*, 446 U.S. at 224.
95. *Id.* (Stewart, J., concurring).
96. *Id.* at 231 (Powell, J., dissenting).
97. *Nichols*, 114 S. Ct. at 1927.
98. *Id.*
99. *Id.* at 1928.
100. 337 U.S. 241, 252 (1949) (holding that the Due Process Clause does not render a defendant's sentence invalid because additional out-of-court

*Pennsylvania*,[101] where the Court held that such prior conduct need only be proved by a preponderance of the evidence.[102] Because a defendant may be sentenced more harshly for a later crime merely on evidence of the conduct underlying a prior conviction, it is "[s]urely . . . constitutional," he argued, for a court to consider the prior conviction itself, obtained only after the conduct has been proven beyond a reasonable doubt.[103]

Justice Souter's concurrence first made the interesting point that *Baldasar* did not have a holding that could be overruled.[104] The *Baldasar* Court was evenly divided, four to four, over whether an uncounseled misdemeanor conviction that is valid under *Scott* because no prison sentence was imposed may be used subsequently to enhance a sentence.[105] Justice Blackmun, he pointed out, did not accept the premise that a prior uncounseled conviction was valid under *Scott*, and gave no indication of his view on the issue before the Court.[106] Therefore, Justice Souter reasoned, "[o]n the question addressed by the other eight Justices . . . the *Baldasar* Court was in equipoise, leaving a decision in the same posture as an affirmance by an equally divided Court, entitled to no precedential value."[107]

Justice Souter also believed that "the difficult constitutional question . . . need not be answered in deciding this case . . . for unlike the sentence-enhancement scheme involved in *Baldasar*, the Sentencing Guidelines do not provide for automatic enhancement based on prior uncounseled convictions."[108] The guidelines "allow

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information was provided to a judge when exercising his power to impose the death penalty).

101. 477 U.S. 79, 91 (1986) (holding that states may consider "visible possession of a firearm" as a factor when sentencing rather than an element of an offense).

102. *Id.* at 91.

103. *Nichols*, 114 S. Ct. at 1928.

104. *Id.* at 1929 (Souter, J., concurring).

105. *Id.* (Souter, J., concurring).

106. *Id.* (Souter, J., concurring).

107. *Id.* (Souter, J., concurring).

108. *Id.* at 1929-30 (Souter, J., concurring). In his view, under *Scott*, a sentencing judge can consider a prior uncounseled misdemeanor conviction when totaling up a defendant's criminal history because the role the guidelines

a defendant to rebut the negative implication to which a prior uncounseled conviction gives rise . . . ."[109] Therefore, he observed, the "concern for reliability is accommodated," and "nothing in the Sixth Amendment or our cases requires a sentencing court to ignore the fact of a valid uncounseled conviction, even if that conviction is a less confident indicator of guilt than a counseled one would be."[110]

In dissent, Justice Blackmun, joined by Justices Stevens and Ginsburg, insisted that the majority's holding violates the fundamental Sixth Amendment principle that "no imprisonment may be imposed on the basis of an uncounseled conviction."[111] Taking direct issue with the majority, Justice Blackmun argued that using prior convictions for sentencing is not the same as using the underlying conduct. Evidence of conduct is less persuasive than a conviction and when the prosecution uses conduct rather than convictions, the defense has more opportunities to challenge its reliability.[112] In a footnote, he also explained that his vote in *Baldasar* stemmed from his dissent in *Scott*, and that "logic dictates that, where the threat of imprisonment is enough to trigger the Sixth Amendment's guarantee of counsel, the actual imposition of imprisonment through an enhancement statute also requires the appointment of counsel."[113]

In *Custis v. United States*,[114] the issue concerned the appropriate forum in which a defendant may challenge a prior conviction's constitutionality.[115] Involved was the sentencing-enhancement structure of the Armed Career Criminal Act [hereinafter ACCA].[116] Under the ACCA, a defendant convicted for possession of a firearm may receive an enhanced sentence if the defendant "has three previous convictions . . . for a violent felony

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give prior convictions is "presumptive, not conclusive . . . ." *Id.* at 1930 (Souter, J., concurring).

109. *Id.* (Souter, J., concurring).

110. *Id.* (Souter, J., concurring).

111. *Id.* at 1931 (Blackmun, J., dissenting).

112. *Id.* at 1934 (Blackmun, J., dissenting).

113. *Id.* at 1932 n.1 (Blackmun, J., dissenting).

114. 114 S. Ct. 1732 (1994).

115. *Id.* at 1734.

116. 18 U.S.C. § 924 (1984).

or a serious drug offense."[117] The government sought an enhanced sentence of Custis based on his three prior state convictions.[118] Custis maintained that in two of his convictions, his attorney was so incompetent as to deprive him of his Sixth Amendment right to effective assistance.[119]

Writing for a six-to-three majority, Chief Justice Rehnquist held that Custis could not deflect enhanced sentencing under the ACCA by challenging the competency of his past lawyers.[120] As a statutory matter, Rehnquist found no authorization for collateral review of prior convictions.[121] He stated that the statute speaks in terms of the "*fact* of the conviction and nothing suggests that the prior final conviction may be subject to collateral attack for potential constitutional errors before it may be counted."[122] He emphasized that in regard to prior felonies, the Act states that a conviction "'which has been . . . set aside' [may not be counted, and thus], creates a clear negative implication that courts *may* count a conviction that has *not* been set aside."[123]

To dispose of the constitutional question, the Chief Justice had to distinguish *Burgett v. Texas*[124] and *United States v. Tucker*,[125] which permitted defendants to collaterally attack, in the sentencing

117. 18 U.S.C. § 924(e)(1).

118. *Custis*, 114 S. Ct. at 1734. The defendant had a 1985 Pennsylvania state conviction for robbery and two Maryland state convictions, one for burglary and the other for attempted burglary. *Id.*

119. *Id.* The defendant argued that "his attorney had failed to advise him of the defense of involuntary intoxication, and that he would have gone to trial, rather than plead guilty, had he been aware of that defense." *Id.* Furthermore, the defendant claimed that his trial on "stipulated facts" was unfair because the facts only established an attempted breaking and entering, not attempted burglary. *Id.*

120. *Id.* at 1738.

121. *Id.* at 1737.

122. *Id.* at 1736.

123. *Id.* (citation omitted).

124. 389 U.S. 109, 115 (1967) (holding that a prior conviction based on a denial of the right to counsel to support guilt or enhance punishment for a second offense is unconstitutional).

125. 404 U.S. 443, 449 (1972) (remanding case for reconsideration as to whether the judge improperly gave consideration to the defendant's record of previous convictions obtained in violation of the right to counsel).

forum, prior convictions obtained in the absence of counsel. He did so by pointing out that both cases involved claims that prior convictions were obtained in violation of an indigent defendant's right to appointed counsel, contrary to *Gideon v. Wainwright*.[126] Denial of appointed counsel is a "unique constitutional defect,"[127] he reasoned, whereas none of the collateral challenges raised by Custis, "rises to the level of a jurisdictional defect resulting from the failure to appoint counsel at all."[128]

The Chief Justice also factored into the Court's decision concerns about the finality of judgments and administrative difficulties in resolving collateral challenges to prior convictions at sentencing.[129] Deciding whether the defendant was adequately represented in those convictions would involve judicial rummaging through far-flung, perhaps non-existent, records.[130] Collateral review also violated the finality principles enunciated in *Parke v. Raley*,[131] which apply with equal force in both habeas corpus and sentencing proceedings. Rehnquist pointed out that federal habeas corpus was available to challenge those convictions for which a defendant was still "in custody."[132]

Justice Souter dissented and was joined by Justices Blackmun and Stevens. He read the Act to contain an implicit intent by Congress "to permit defendants to attempt to show at sentencing that prior convictions were 'unconstitutionally obtained.'"[133] He

126. 372 U.S. 335, 344 (1963) (finding a fundamental right for indigent defendants to have the assistance of counsel at criminal trials).

127. *Id.* ("The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours.").

128. *Custis*, 114 S. Ct. at 1738.

129. *Id.* at 1738-89.

130. *Id.*

131. 113 S. Ct. 517 (1992). The Court noted that the "'presumption of regularity' that attaches to final judgments, even when the question is waiver of constitutional rights" is a presumption that is deeply rooted in our jurisprudence. *Id.* at 523.

132. *Custis*, 114 S. Ct. at 1739. Rehnquist stated that should the defendant succeed in his challenge to any of those convictions, he could then apply for a modification of any federal sentence predicated on the defective state conviction. *Id.*

133. *Id.* at 1740 (Souter, J., dissenting) (citation omitted).

pointed out that *Burgett* and *Tucker* had been decided when Congress had drafted the ACCA, and so those decisions' interpretations of the Sixth Amendment must have guided Congress' intention when it wrote the statute.[134] Thus, he could not accept that Congress' silence regarding a right to collateral review of prior convictions used for ACCA enhancement meant that Congress intended to withhold such a right.[135]

Similar to his "narrow issue" approach in *Nichols* (and an oft-repeated Brandeis-Harlan approach that seems his signature), Justice Souter thought it unnecessary to reach the constitutional issue.[136] However, he addressed the constitutional issue anyway and took direct issue with the majority's limited reading of *Burgett* and *Tucker*. He perceived no significant distinction between challenges to prior convictions based on a denial of the right to appointed counsel and denials of the right to have the effective assistance of counsel and to be free from convictions based on unknowing or involuntary guilty pleas.[137]

## III. CIVIL FORFEITURE

In *United States v. James Daniel Good Real Property*,[138] the Court dealt the government another setback in its use of civil forfeiture against drug offenders.[139] In an opinion by Justice

134. *Id.* (Souter, J., dissenting).

135. *Id.* (Souter, J., dissenting).

136. *Id.* at 1739 (Souter, J., dissenting).

137. *Id.* at 1739-40 (Souter, J., dissenting). It is interesting to note that in her separate dissent in *Nichols*, Justice Ginsburg explained her reasons for joining the majority in *Custis* as based on the fact that *Custis* involved what forum a defendant may challenge a prior conviction's constitutionality, whereas *Nichols* involved the question of whether he could do so at all. Nichols v. United States, 114 S. Ct. 1921, 1937 (1994) (Ginsburg, J., dissenting).

138. 114 S. Ct. 492 (1993).

139. Last year, the Court decided four forfeiture cases against the government: United States v. 92 Buena Vista Ave., Rumson, N.J., 113 S. Ct. 1126, 1134 (1993) (limiting the interpretation of the "relation back" provision of the forfeiture statute to allow government ownership only after there is a forfeiture decree); Austin v. United States, 113 S. Ct. 2801, 2812 (1993) (stating that forfeiture is not solely for remedial purposes but is used for punishments although subject to the limits of the Eighth Amendment's Excessive Fines

Kennedy, a five-member majority held that absent exigent circumstances, notice and an adversary hearing are required before the government may seize real property that is allegedly subject to civil forfeiture under the drug laws.[140]

Justice Kennedy rejected the government's argument that because civil forfeiture serves a "law enforcement purpose" the government need comply only with the Fourth Amendment when seizing property.[141] He pointed out that the Court, in *Calero-Toledo v. Pearson Yacht Leasing Co.*,[142] had analyzed the constitutionality of an *ex parte* seizure of a yacht under due process principles and not the Fourth Amendment. That the government prevailed in *Calero-Toledo* was of no consequence since the yacht, being movable, presented an "extraordinary situation" that justified an exception to the general due process rule requiring pre-deprivation hearing and notice.[143]

Justice Kennedy held that whether the government's seizure of the real property at issue in *James Daniel* was an "extraordinary situation" had to be analyzed under the three-prong due process framework of *Mathews v. Eldridge*.[144] *Mathews* requires a court to weigh several factors: the private interest affected by the official action, the risk of an erroneous deprivation of that interest through the procedures used, and the government's interest, including the

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Clause); Alexander v. United States, 113 S. Ct. 2766, 2776 (1993) (stating that forfeiture of property under both the civil and criminal forfeiture laws is subject to the Eighth Amendment's Excessive Fines Clause); Republic Nat'l Bank of Miami v. United States, 113 S. Ct. 554, 559-60 (1992) (stating that government's quick movement of a *res* after winning a forfeiture judgment does not prevent the court of appeals from entertaining an appeal by the claimant since *in rem* forfeiture was designed to "expand the reach of the courts and to furnish remedies for aggrieved parties").

140. *James Daniel*, 114 S. Ct. at 505.

141. *Id.* at 499.

142. 416 U.S. 663 (1974). In *Calero-Toledo*, the Court held that due process was not denied by a Puerto Rican statute, in which a leased pleasure yacht was seized in forfeiture proceedings without prior notice. *Id.* at 679. The Court ruled that seizure served a significant government purpose of permitting Puerto Rico to assert *in rem* jurisdiction and the Court found that preseizure notice might have frustrated the governmental interest. *Id.* at 679-80.

143. *Id.* at 680.

144. 424 U.S. 319 (1976).

administrative burden that additional procedural requirements would impose.[145]

Applying those factors in *James Daniel*, Justice Kennedy found that the claimant's interest in his home is of "historic and continuing importance," even though at the time of the seizure, the claimant was renting the home to others.[146] It is also an interest that is greater, he emphasized, than the threatened loss of kitchen appliances and furniture that the Court, in *Fuentes v. Shevin*,[147] had already held required a pre-deprivation hearing. Secondly, Justice Kennedy observed that *ex parte* seizures create an unacceptable risk of error, in that the government's *ex parte* submission will generally not contain evidence of a claimant's innocent ownership or any other defenses he might have to the forfeiture.[148] Lastly, the government's interest, Kennedy concluded, was not strong, and there was "no pressing need" for proceeding without notice to the property owner. Justice Kennedy also pointed out that the government has various less intrusive means to protect its legitimate interests in forfeitable real property, such as a *lis pendens* notice to prevent sale of the property, a restraining order to prevent its destruction, or search and arrest warrants to forestall further illegal activity.[149]

Chief Justice Rehnquist, joined by Justice Scalia and in part by Justice O'Connor, labeled the majority's opinion an "ill-considered and disruptive decision."[150] He concluded that "there is no need to look beyond the Fourth Amendment in civil forfeiture proceedings involving the Government because *ex parte* seizures are 'too firmly fixed in the punitive and remedial jurisprudence of the country to be now displaced,'"[151] and lamented that "[i]t is paradoxical

145. *Id.* at 335.

146. *James Daniel*, 114 S. Ct. at 501.

147. 407 U.S. 67, 96 (1972) ("We hold that the Florida and Pennsylvania prejudgment replevin provisions work a deprivation of property without due process of law insofar as they deny the right to a prior opportunity to be heard before chattels are taken from their possessor.").

148. *James Daniel*, 114 S. Ct. at 501-02.

149. *Id.* at 503-04.

150. *Id.* at 507 (Rehnquist, C.J., concurring in part & dissenting in part).

151. *Id.* at 509 (Rehnquist, C.J., concurring in part & dissenting in part) (quoting Goldsmith v. United States, 254 U.S. 505, 510-11 (1921)).

indeed to hold that a criminal defendant can be temporarily deprived of liberty on the basis of an *ex parte* probable cause determination, yet respondent Good cannot be temporarily deprived of property on the same basis."[152]

In a separate opinion, Justice O'Connor agreed with Rehnquist that the majority's effort to distinguish between real and personal property was unpersuasive. She also believed that there was no need for notice to the claimant beyond the fact of his conviction and she found it difficult to see what good a hearing would do.[153]

Justice Thomas also concluded that Good had not been denied due process "'simply because Good did not receive preseizure notice and an opportunity to be heard.'"[154] However, Thomas found the occasion appropriate for an expression of his broader views about government entitlements and private property.[155] Acknowledging that he shared the majority's discomfort in regard to "the breadth of new civil forfeiture statutes such as 21 U.S.C. § 881(a)(7), which subjects to forfeiture *all* real property that is used, or intended to be used, in the commission, or even the *facilitation*, of a federal drug offense,"[156] "it may be necessary," he stated, "to reevaluate our generally deferential approach to legislative judgments in this area of civil forfeiture."[157]

Prior to the decisions last Term and now in *James Daniel*, there was more than ample reason to believe that civil forfeiture would remain untrammeled in the government's drug war arsenal. That belief now seems misplaced. The Court's decisions in the civil forfeiture context are significant in that in hard times, even a conservative Court will not necessarily embrace an "ends justifies the means" approach.

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152. *Id.* at 508 (Rehnquist, C.J., concurring in part & dissenting in part).

153. *Id.* at 511-13 (O'Connor, J., concurring in part & dissenting in part).

154. *Id.* at 516 (Thomas, J., concurring in part & dissenting in part) (citation omitted).

155. *Id.* at 515 (Thomas, J., concurring in part & dissenting in part). Justice Thomas remarked that "[i]n my view, as the Court has increasingly emphasized the creation and delineation of entitlements in recent years, it has not always placed sufficient stress upon the protection of individuals' traditional rights in real property." *Id.* (Thomas, J., concurring in part & dissenting in part).

156. *Id.* (Thomas, J., concurring in part & dissenting in part).

157. *Id.* (Thomas, J., concurring in part & dissenting in part).

## IV. DOUBLE JEOPARDY

Of the several double jeopardy cases this Term, *Department of Revenue of Montana v. Kurth Ranch*,[158] is the most interesting and analytically, the most challenging. It is interesting because a five-member majority again coalesced to thwart operation of another governmental drug war stratagem. It is challenging because the ingenuity of the Montana scheme required the Court, for the first time, to decide whether a tax can violate the Double Jeopardy Clause.

Five years ago, in *United States v. Halper*,[159] the Court held that a "civil" penalty can be so severe, and so far divorced from the costs occasioned by the conduct the penalty seeks to remedy, as to constitute "punishment" for double jeopardy purposes.[160] In *Kurth Ranch*, however, the *Halper* rationale did not furnish the basis for decision. Instead, the five-member majority, in an opinion by Justice Stevens, concluded that Montana's drug tax statute violated the Double Jeopardy Clause because of several "unusual features."[161]

Montana's Dangerous Drug Tax Act imposed a tax "'on the possession and storage of dangerous drugs'" that was to be collected after all fines and forfeitures had been collected.[162] The assessment of the tax was either ten percent of the market value of

158. 114 S. Ct. 1937 (1994).

159. 490 U.S. 435 (1989). In *Halper*, a medical laboratory employee filed 65 false claims for medicare reimbursement, each of which overstated the amount reimbursable by $9, resulting in a fraud on the government of $585. *Id.* at 437. The employee was also convicted of 65 counts of violating the criminal false claims statute and was sentenced to two years in prison and fined $5,000. *Id.* Subsequently, the government brought a civil action against the defendant under the False Claims Act seeking a civil penalty of $2,000, double damages for each violation, subjecting the defendant to a penalty of more than $130,000. *Id.* at 438. The Court held that "under the Double Jeopardy Clause, a defendant who already has been punished in a criminal prosecution may not be subjected to an additional civil sanction to the extent that the second sanction may not fully be characterized as remedial, but only as a deterrent or retribution." *Id.* at 448-49.

160. *Id.* at 449-50.

161. *Kurth Ranch*, 114 S. Ct. at 1947.

162. *Id.* at 1941.

the drug as determined by the Montana Department of Revenue, or a "specified amount depending on the drug, . . . whichever was greater."[163] Proceeds were to be used for drug education programs.[164] A taxpayer, under the Act, was under no obligation to pay the tax until he or she had been arrested, but had to do so within seventy-two hours of his or her arrest. The police were authorized to fill out a dangerous diary information report and have the taxpayer sign it; if he or she refused, the police were required to file the report within 72 hours of the arrest.[165]

The Kurth family began growing and selling marijuana in 1986. Some two weeks after the Drug Tax Act took effect, Montana police "raided the farm, arrested the Kurths, and confiscated . . . the marijuana plants."[166] Upon commencement of a civil forfeiture action by the county attorney, the Kurths agreed to forfeit $18,016 in cash and various items of marijuana operation equipment.[167] Seeking to enforce the new Drug Tax Act against the Kurths, the Department of Revenue claimed it was entitled to almost $900,000.[168] In state administrative proceedings, the Kurths contested the assessment. However, the proceedings were stayed automatically when the Kurths filed for bankruptcy under Chapter 11.[169]

The bankruptcy court, relying on *Halper*, held that only $181,000 could be assessed under state law but any further assessment violated the Double Jeopardy Clause.[170] The district court affirmed, holding that the Act punished the Kurths a second time for the same criminal conduct.[171] The Ninth Circuit affirmed but declined to hold the tax unconstitutional on its face.[172] Instead,

163. *Id.*
164. *Id.*
165. *Id.* at 1941-42.
166. *Id.* at 1942. Six members of the Kurth family entered guilty pleas to various drug offenses, with the parents receiving prison sentences and the remaining four members receiving deferred sentences. *Id.*
167. *Id.*
168. *Id.*
169. *Id.* at 1943.
170. *Id.*
171. *Id.*
172. *Id.*

the Ninth Circuit held that the state had not proven that the tax was justified.[173] While the *Kurth* case was pending an appeal, the Montana Supreme Court, in an unrelated case, held that the Dangerous Drug Tax Act did not violate the Double Jeopardy Clause.[174] Thus, the Supreme Court was presented with conflicting interpretations of the Act by the federal and state courts.

Justice Stevens concluded that *Halper* did not provide a dispositive rationale for this case because *Halper* involved a civil penalty, not a tax.[175] However, Justice Stevens indicated that several of *Halper*'s premises were germane to analysis of the tax issue, including the premise that the Double Jeopardy Clause affords protection to a convicted and punished defendant from imposition of a non-remedial civil penalty, and that the label attached by the state to a civil penalty does not necessarily control.[176] More to the point, Justice Stevens observed, was the Court's previous recognition that "'there comes a time in the extension of the penalizing features of the so-called tax when it loses its character as such and becomes a mere penalty with the characteristics of regulation and punishment.'"[177] Justice Stevens concluded that Montana's drug tax crossed the line between a legitimate tax and punishment for several reasons.[178]

To underscore his point, Justice Stevens stressed the distinction between the Montana Tax and "mixed-motive" taxes that seek both to deter a disfavored activity and to raise money:

> By imposing cigarette taxes, for example, a government wants to discourage smoking. But because the product's benefits--such as

173. *Id.* at 1944.

174. *See* Sorenson v. State Dep't of Revenue, 836 P.2d 29 (Mont. 1992).

175. *Kurth Ranch*, 114 S. Ct. at 1944.

176. *Id.* at 1945.

177. *Id.* at 1946 (citation omitted).

178. *Id.* First, although the high rate of the tax and its obvious deterrent purpose did not automatically render the tax as punishment, they were important features. *Id.* Second, and most significant, the Montana tax "is conditioned on the commission of a crime" and "is exacted only after the taxpayer has been arrested for the precise conduct that gives rise to the tax obligation . . . ." *Id.* at 1947. Thus, "[p]ersons who have been arrested for possessing marijuana constitute the entire class of taxpayers subject to the Montana tax." *Id.*

> creating employment, satisfying consumer demand, and providing tax revenues--are regarded as outweighing the harm, the government will allow the manufacture, sale, and use of cigarettes as long as the manufacturers, sellers, and smokers pay high taxes that reduce consumption and increase government revenue. These justifications vanish when the taxed activity is completely forbidden, for the legitimate revenue-raising purpose that might support such a tax could be equally well served by increasing the fine imposed upon conviction.[179]

Justice Stevens also observed that the Montana tax possessed another exceptional feature: although it purports to be a property tax, "it is levied on goods that the taxpayer neither owns nor possesses when the tax is imposed."[180] Therefore, reasoned Justice Stevens, "[a] tax on 'possession' of goods that no longer exist and that the taxpayer never lawfully possessed has an unmistakable punitive character."[181]

Chief Justice Rehnquist, dissenting, agreed that *Halper*'s focus on the distinction between remedial and punitive purposes is inappropriate in the context of a tax, but he disputed the majority's conclusion that the characteristics of the Montana drug tax made it "punishment."[182] He pointed to Justice Stevens' acknowledgment that taxes may legitimately have the dual purpose of raising revenue and deterring conduct and argued that just because the conduct being deterred is already prohibited by a criminal statute does not make the tax "punishment."[183]

Rehnquist also took issue with the majority's assertion that the Montana tax was conditioned on a criminal conviction. For him, the statute merely recognized that a criminal prosecution is a necessary coincidence of taxing criminal conduct.[184] Lastly, Rehnquist observed that the statute was designed to raise revenue

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179. *Id.*

180. *Id.* at 1948.

181. *Id.* "Taken as a whole," he concluded, "this drug tax is a concoction of anomalies, too far-removed in crucial aspects from a standard tax assessment to escape characterization as punishment for purposes of Double Jeopardy analysis." *Id.*

182. *Id.* at 1949 (Rehnquist, C.J., dissenting).

183. *Id.* at 1950 (Rehnquist, C.J., dissenting).

184. *Id.* at 1951 (Rehnquist, C.J., dissenting).

by taxing a lucrative underground business and that its tax rate is not so out-of-step with other "sin taxes" as to justify characterizing it as punishment.[185]

Justice O'Connor, also dissenting, argued that *Halper*, which focused on "the overwhelming disproportionality" between the sanction and the damages caused by the wrongful conduct, was the appropriate precedent.[186] But under *Halper*, she concluded, Montana's tax is constitutional.[187] O'Connor emphasized that under *Halper*, "the defendant must first show the absence of a rational relationship between the amount of the sanction and the government's non punitive objectives; the burden then shifts to the government to justify the sanction with reference to the particular case."[188] Justice O'Connor was also disturbed that the majority's decision invalidates other numerous state drug taxes, which she believed were legitimate attempts to obtain recompense for the high costs of drug law enforcement.[189]

Justice Scalia, joined by Justice Thomas, also dissented. As is not infrequently the case with Justice Scalia, he again argued for overruling prior precedent, insisting that once again the majority had departed from the constitutional text. This time, it was *Halper* that should be overruled because the Double Jeopardy Clause prohibits only multiple prosecutions--not multiple punishments.[190]

Justice Scalia also believed that the majority had based its decision on the assumption that the proceeding initiated to collect

185. *Id.* at 1952 (Rehnquist, C.J., dissenting). Justice Rehnquist further noted that this tax should not be considered arbitrary or shocking based upon the traditional deference given to the states in matters of taxation and that a significant number of illegal drug traffickers will escape the taxation. *Id.* (Rehnquist, C.J., dissenting).

186. *Id.* at 1953 (O'Connor, J., dissenting).

187. *Id.* (O'Connor, J., dissenting).

188. *Id.* at 1954 (O'Connor, J., dissenting). Furthermore, Justice O'Connor noted that under *Halper*, "it will be the 'rare case' in which the litigant will succeed in satisfying the first prong of the constitutional analysis." *Id.* at 1955 (O'Connor, J., dissenting).

189. *Id.* (O'Connor, J., dissenting).

190. *Id.* (Scalia, J., dissenting). "'To be put in jeopardy'" Scalia argued, "does not remotely mean 'to be punished,' so by it terms this provision [the Double Jeopardy Clause] prohibits, not multiple punishments, but only multiple prosecutions." *Id.* (Scalia, J., dissenting).

the tax was a criminal prosecution.[191] Although he conceded that *Kennedy v. Mendoza-Martinez*[192] and *United States v. Ward*[193] accept that civil proceedings which impose a sanction so severe as to constitute "punishment" may be treated as a criminal prosecution for double jeopardy purposes, Scalia argued that the *Kennedy-Ward* test sets such a high standard for a civil sanction to qualify as "punishment," that the Montana tax does not qualify.[194]

The "successive prosecution" issue did arise in two other cases, *Schiro v. Farley*,[195] and *Caspari v. Bohlen*.[196] Both were federal habeas corpus challenges to state court convictions; *Schiro* was decided on the merits, but *Caspari* ran afoul of the "new rule" principle espoused in *Teague v. Lane*.[197]

In *Schiro*, the defendant was convicted of murdering a young woman while committing the crime of rape. He had been charged with three counts of murder: "knowingly" killing his victim, killing her while committing rape, and killing her while committing deviant conduct.[198] The jury rejected the defendant's insanity defense but returned a verdict only as to the count of killing while committing rape. Following a sentencing hearing, the jury recommended against the death penalty, but the trial judge rejected that recommendation.[199] The trial court reasoned that the state effectively proved beyond a reasonable doubt that the defendant intentionally killed the young woman while committing a rape.[200]

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191. *Id.* at 1959 (Scalia, J., dissenting).

192. 372 U.S. 144 (1963).

193. 448 U.S. 242 (1980).

194. *Kurth Ranch*, 114 S. Ct. at 1959-60 (Scalia, J., dissenting).

195. 114 S. Ct. 783 (1994).

196. 114 S. Ct. 948 (1994).

197. 489 U.S. 288 (1989). In *Teague*, the Court announced the general rule of nonretroactivity for cases on collateral review. *Id.* at 307. However, there are two exceptions where a new rule should be applied retroactively. "First, a new rule should be applied retroactively if it places 'certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe.'" *Id.* (citation omitted). "Second, a new rule [will] be applied retroactively if it requires the observance of 'those procedures that . . . are "implicit in the concept of ordered liberty."'" *Id.* (citation omitted).

198. *Schiro*, 114 S. Ct. at 787.

199. *Id.*

200. *Id.*

The defendant argued that the jury had acquitted him of the intentional murder count, and that the trial judge's subsequent imposition of the death penalty constituted double jeopardy. The Seventh Circuit rejected his claim.[201]

By a seven-to-two majority, the Supreme Court affirmed the Ninth Circuit's ruling. Justice O'Connor, writing for the majority, held that the sentencing phase of a single capital proceeding cannot be treated as a "successive prosecution" for double jeopardy purposes.[202] Since the Court had held previously that a second sentencing proceeding does not violate the Double Jeopardy Clause, "we fail to see how an initial sentencing proceeding could do so," she stated.[203]

Justice O'Connor distinguished *Bullington v. Missouri*[204] from the instant case. In *Bullington*, the Court had held that a defendant sentenced to life imprisonment, following a trial-like capital sentencing proceeding, is protected by the Double Jeopardy Clause against imposition of the death penalty if he obtains a reversal of his conviction and is retried and reconvicted.[205] Justice O'Connor explained that the Court, in *Bullington*, created a narrow exception to the general principle because the capital sentencing proceeding was deemed tantamount to a separate trial on the issue of punishment.[206] In contrast to *Bullington*, she pointed out, the state in *Schiro*'s case did not subject him to a second death penalty proceeding but merely conducted a single sentencing proceeding in the course of a single prosecution.[207] The state was entitled to this "'one fair opportunity'" to prosecute Schiro.[208]

Schiro's collateral estoppel claim also proved unsuccessful. The majority held that Schiro had failed to carry his threshold burden of demonstrating that the jury in his case necessarily acquitted him of

201. Schiro v. Clark, 963 F.2d 962, 971 (7th Cir. 1992), *aff'd sub nom.* Schiro v. Farley, 114 S. Ct. 783 (1994).
202. *Schiro*, 114 S. Ct. at 789.
203. *Id.*
204. 451 U.S. 430 (1981).
205. *Id.* at 446.
206. *Schiro*, 114 S. Ct. at 790.
207. *Id.*
208. *Id.* (citation omitted).

intentional murder during the guilt-innocence phase.[209] Justice O'Connor noted that "[t]he jury was not instructed to return verdicts on all the counts submitted to it, nor was it instructed to decide the counts in any particular order."[210] Even though an intent to kill is not necessary to convict a defendant of felony murder, Schiro's attempt to draw meaning from the jury's verdict on that offense but not on the intentional murder count was frustrated by the trial court's instruction that the state must prove an intentional killing to convict Schiro of murder.[211]

Justice Blackmun dissented, maintaining that *Bullington* applied and that the jury's failure to convict the defendant of intentional murder amounted to an implied acquittal that precluded a death sentence on the basis of an intentional-murder aggravating circumstance.[212] Justice Stevens also dissented in an opinion joined by Justice Blackmun. Stevens believed that the jury necessarily decided that the defendant had not committed intentional murder at both the guilt-innocence phase and the sentencing hearing.[213] "[A]n egregious violation of the . . . Double Jeopardy Clause" occurred, he insisted, when the trial judge based Schiro's death sentence on a factor that the jury had rejected.[214]

The "successive prosecution" issue also arose in *Caspari*. In *Caspari*, the defendant sought to have the Court answer, in the affirmative, a question that remained after *Bullington*: "whether the Double Jeopardy Clause prohibits a state from twice subjecting a defendant to a *noncapital* sentence enhancement proceeding."[215] It is a question that will have to be resolved in another case.

In an opinion for an eight-member majority, Justice O'Connor rejected the court of appeals' ruling that Missouri's persistent-

209. *Id.*

210. *Id.* at 791.

211. *Id.*

212. *Id.* at 792-93 (Blackmun, J., dissenting). Justice Blackmun asserted that the defendant's death sentence warranted vacation because under the essential holding of *Bullington*, the defendant's death sentence proceeding "*can* constitute a 'jeopardy' under the Double Jeopardy Clause." *Id.* at 793 (Blackmun, J., dissenting).

213. *Id.* at 794-95 (Stevens, J., dissenting).

214. *Id.* at 796 (Stevens, J., dissenting).

215. *Caspari*, 114 S. Ct. at 951.

offender sentence enhancement procedure has protections similar to those in the capital sentencing hearing in *Bullington*.[216] O'Connor, as well, rejected the court of appeals' contention that it was a "short step" to apply the same double jeopardy protections to a noncapital sentencing proceeding as the Court had done in a capital sentencing hearing.[217] The court of appeals erred because it misapplied the "new rule" requirement of *Teague*; a requirement that is a threshold issue in habeas corpus.[218]

Justice O'Connor set forth the necessary steps that a federal court must follow when faced with a *Teague* issue. First, the court must determine the date that the petitioner's conviction became final.[219] Second, the court must canvass the state of the law at the time the petitioner's conviction became final and determine whether a state court "'would have felt compelled by existing precedent to conclude'" that the rule sought by the petitioner was required by the Constitution.[220] Third, if it is a new rule, then the court should determine whether either of *Teague*'s two exceptions would apply.[221]

The majority concluded that *Bullington* did in fact establish a new rule. Justice O'Connor noted that traditionally, sentencing has been thought not to implicate the Double Jeopardy Clause because "'a sentence does not have the qualities of constitutional finality that attend an acquittal.'"[222] However, the cases on which the petitioner based his argument, *Bullington* and *Arizona v. Rumsey*,[223] were both capital cases. While these cases attached double jeopardy consequences to a sentencing determination, Justice O'Connor explained that the reasoning which led to those results were based on the "unique circumstances of . . . capital

216. *Id.* at 957.
217. *Id.*
218. *Id.*
219. *Id.* at 953.
220. *Id.* (citing Saffle v. Parks, 494 U.S. 484, 488 (1990)).
221. *Caspari*, 114 S. Ct. at 953.
222. *Id.* at 954 (citation omitted).
223. 467 U.S. 203 (1984). The Court held that double jeopardy protections apply where respondent was initially sentenced to life imprisonment. *Id.* at 212. The Court ruled that this constituted an acquittal of the death penalty and the state could not then sentence respondent to death on his murder charge. *Id.*

sentencing."[224] Justice O'Connor noted that other decisions, such as *Strickland v. Washington*[225] and *Pennsylvania v. Goldhammer*,[226] "strongly suggested that *Bullington* was limited to capital sentencing."[227] Therefore, she concluded, "a reasonable jurist reviewing our precedents at the time respondent's conviction and sentence became final would not have considered the application of the Double Jeopardy Clause to a noncapital sentencing proceeding to be dictated by our precedents."[228]

Justice Stevens was the lone dissenter. He believed that the state had forfeited the *Teague* issue and he criticized the majority for forgiving waivers by the state, as was done in *Schiro*, while being more strict with habeas petitioners.[229] On the merits, Stevens had "no hesitation" in concluding that double jeopardy protection applied to Missouri's sentence enhancement.[230]

## V. JURY INSTRUCTIONS

### *A. Reasonable Doubt*

Four years ago, in *Cage v. Louisiana*,[231] the Court held that a judge's reasonable doubt charge containing the phrases "moral certainty," "actual substantial doubt," and "grave uncertainty," did not accurately apprise the jury of the burden of proof required, as a matter of due process,[232] required under *In re Winship*.[233] A year

224. *Caspari*, 114 S. Ct. at 954.
225. 466 U.S. 668 (1984).
226. 474 U.S. 28 (1985).
227. *Caspari*, 114 S. Ct. at 955.
228. *Id.*
229. *Id.* at 957 (Stevens, J., dissenting).
230. *Id.* at 958 (Stevens, J., dissenting).
231. 498 U.S. 39 (1990) (per curiam).
232. *Id.* at 40-41 ("It is plain to us that the words 'substantial' and 'grave,' as they are commonly understood, suggest a higher degree of doubt than is required for acquittal under the reasonable doubt standard.").
233. 397 U.S. 358, 368 (1970) (holding that juveniles, like adults, are entitled to proof beyond a reasonable doubt when charged with violating criminal laws).

later, in *Estelle v. McGuire*,[234] *Cage*'s potential was weakened somewhat by the Court's holding that the standard for reviewing a challenged jury instruction is not whether the instruction could have been applied in an unconstitutional manner, but whether there is a "reasonable likelihood" that the jury *did* so apply it.[235] This Term, the Court, in *Victor v. Nebraska*,[236] again grappled with the definition of "reasonable doubt" in jury instructions. In *Victor*, the Court appears to have further diluted *Cage*.

*Victor* was consolidated for argument with *Sandoval v. California*; and in both cases, the jury instructions contained language condemned in *Cage*. The Nebraska and California Supreme Courts found *Cage* distinguishable and affirmed the convictions of the defendants, both of whom had been convicted of murder and sentenced to death.[237]

Writing for the majority, Justice O'Connor first addressed *Sandoval*, in which the jury was instructed that reasonable doubt "'is *not a mere possible doubt*; because everything relating to human affairs, and *depending on moral evidence*, is open to some possible or imaginary doubt.'"[238] Instead, the judge charged, reasonable doubt "'is that state of the case which, after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction, *to a moral certainty*, of the truth of the charge.'"[239]

Justice O'Connor traced this charge to one given in 1850 by Chief Justice Shaw of Massachusetts. At that time, the phrases "moral evidence" and "moral certainty" were intended to convey

234. 502 U.S. 62 (1991).

235. *Id.* at 73 n.4.

236. 114 S. Ct. 1239 (1994).

237. *See* People v. Sandoval, 841 P.2d 862, 878 (Cal. 1992) ("Despite use of the term 'moral certainty' in [jury instruction] No. 2.90, the instruction does not suffer from the flaws condemned in *Cage v. Louisiana* . . . ."), *aff'd sub nom.* Victor v. Nebraska, 114 S. Ct. 1239 (1994); State v. Victor, 494 N.W.2d 565, 569 (Neb. 1993) (finding defendant's argument that reasonable doubt instruction was unconstitutional without merit), *aff'd sub nom.* Victor v. Nebraska, 114 S. Ct. 1239 (1994).

238. *Victor*, 114 S. Ct. at 1244 (citation omitted).

239. *Id.* (citation omitted).

the highest level of certainty that someone can expect to reach in a matter involving things human or "moral." She noted that subsequent cases made clear that "proof to a moral certainty" was a synonym for "proof beyond a reasonable doubt."[240] Also, she observed, modern dictionaries that define "moral evidence" do so in a manner consistent with its original meaning.

In light of this background Justice O'Connor, writing here for the entire Court, rejected Sandoval's claim that the jury in his case was left to base its verdict on something other than the evidence presented or something less than proof beyond a reasonable doubt.[241] She conceded that "moral certainty is ambiguous in the abstract,"[242] but pointed out that other directions in the challenged instruction focused the jury on the facts of the case and lent content to the phrase.[243] Because the jury was so focused, Justice O'Connor maintained, *Cage* was distinguishable since the Court in *Cage* found that "the jurors were simply told that they had to be morally certain of the defendant's guilt; there was nothing else in the instruction to lend meaning to the phrase."[244]

The Court's concern with the inclusion of "moral certainty" was again expressed. Justice O'Connor observed that in a different case, jurors faced with less explicit instructions than that given to Sandoval's jury might interpret that phrase or "moral evidence" as something less than reasonable certainty. Accordingly, she recommended against use of such terms in the future.

The Court did not remain unanimous, however, when it turned its attention to the jury charge in *Victor*. In that case the Nebraska trial judge instructed that:

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240. *Id.* at 1246.

241. *Id.* at 1247.

242. *Id.*

243. *Id.* at 1246. The Court found that:

> The jury was told that 'everything relating to human affairs, and depending on moral evidence, is open to some possible or imaginary doubt'--in other words, that absolute certainty is unattainable in matters relating to human affairs. Moral evidence in this sense, can only mean empirical evidence offered to prove such matters--the proof introduced at trial.

*Id.*

244. *Id.* at 1248.

> 'Reasonable doubt' is such a doubt as would cause a reasonable and prudent person, in one of the graver and more important transactions of life, to pause and hesitate before taking the represented facts as true and relying and acting thereon. It is such a doubt as will not permit you, after full, fair, and impartial consideration of all the evidence, to have an abiding conviction, *to a moral certainty*, of the guilt of the accused. At the same time, absolute or mathematical certainty is not required. . . . You may find an accused guilty upon the *strong probabilities of the case*, provided such probabilities are strong enough to exclude any doubt of his guilt that is reasonable. A reasonable doubt is an *actual and substantial doubt* arising from the evidence, from the facts or circumstances shown by the evidence, or from the lack of evidence on the part of the state, as distinguished from mere possibility, from bare imagination, or from fanciful conjecture.[245]

Only a bare majority agreed with most of Justice O'Connor's opinion as to this charge. She concluded that the "substantial doubt" language, though "somewhat problematic," was adequately clarified by the rest of the charge. The context made clear that "substantial doubt" was intended to distinguish "fanciful" conjecture and not to refer to the "magnitude of doubt," which, Justice O'Connor acknowledged, "could imply a doubt greater than required for acquittal under *Winship*."[246] What made this instruction's use of "substantial doubt" different from that in *Cage* is the latter's lack of any accompanying clarification.

Similarly, Justice O'Connor concluded, the "moral certainty" language included in the charge was, as in *Sandoval*, adequately clarified by the instructions surrounding it. These surrounding instructions, she noted, explained that a doubt that would preclude a "moral certainty" was "a doubt that would cause a reasonable person to hesitate to act."[247] Lastly, the majority held that the reference to "strong probabilities" in the jury instruction did not violate due process because "in the same sentence, the instruction

245. *Id.* at 1249.

246. *Id.* at 1250.

247. *Id.* at 1250-51. Justice O'Connor explained that "a juror morally certain of a fact would not hesitate to rely on it; and such a fact can fairly be said to have been proven beyond a reasonable doubt." *Id.* at 1251.

informs the jury that the probabilities must be strong enough to prove the defendant's guilt beyond a reasonable doubt."[248]

Concurring, Justice Kennedy observed that "[i]t was commendable for Chief Justice Shaw to pen an instruction that survived more than a century, but . . . what once might have made sense to jurors has long since become archaic."[249] He found "moral evidence," as used in *Sandoval*, even more troubling than "moral certainty." He recommended that both be omitted in the future.[250]

Justice Ginsburg, concurring in part and concurring in the judgment, expressed disapproval of the Nebraska judge's "hesitation to act" language and his circular language about the "strong probabilities of the case."[251] She recommended use of the Federal Judicial Center's proposed definition of reasonable doubt which she believed is "clear, straightforward, and accurate."[252]

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248. *Id.*

249. *Id.* at 1251 (Kennedy, J., concurring). Justice Kennedy found "moral evidence," as used in *Sandoval*, even more troubling than "moral certainty" and he recommended that both be omitted in the future. *Id.* (Kennedy, J., concurring).

250. *Id.* (Kennedy, J., concurring).

251. *Id.* at 1252 (Ginsburg, J., concurring).

252. *Id.* at 1253 (Ginsburg, J., concurring). The Judicial Center's charge reads as follows:

> The government has the burden of proving the defendant guilty beyond a reasonable doubt. Some of you may have served as jurors in civil cases, where you were told that it is only necessary to prove that a fact is more likely true than not true. In criminal cases, the government's proof must be more powerful than that. It must be beyond a reasonable doubt.
>
> Proof beyond a reasonable doubt is proof that leaves you firmly convinced of the defendant's guilt. There are very few things in this world that we know with absolute certainty, and in criminal cases the law does not require proof that overcomes every possible doubt. If, based on your consideration of the evidence, you are firmly convinced that the defendant is guilty of the crime charged, you must find him guilty. If on the other hand, you think there is a real possibility that he is not guilty, you must give him the benefit of the doubt and find him not guilty.

FJC, PATTERN CRIMINAL JURY INSTRUCTIONS § 21 (1987).

Justice Blackmun, joined by Justice Souter, dissented in part, arguing that the instruction given in *Victor* was not significantly different from the instruction that was struck down in *Cage*.[253]

It is reasonable to expect that trial judges will accept the Supreme Court's recommendation that phrases such as "moral certainty" and "moral evidence" be avoided. It has been my experience, however, that the word does not filter down so easily, whether it be that of the Supreme Court or of courts closer to home. Judges all too often utilize language in their instructions that appellate courts have previously condemned, thereby causing unnecessary reversals. In most instances, I believe continued use results from a trial judge's ignorance or sloppiness. In some cases, however, I believe there is present a degree of willfulness.

The decision in *Victor*, I fear, will not change this. *Victor* has already been perceived by at least one high state court as a retrenchment from *Cage*. In *State v. Smith*,[254] the Louisiana Supreme Court affirmed a conviction where "moral certainty" was included in the trial judge's charge. The court observed that "while *Cage* focused on the presence of the suspect terms in the instruction, the *Victor* court considered the relationship of the terms to the instruction as a whole to determine whether the jurors were reasonably likely to have misapplied the instruction."[255] This conclusion may hold true in the future.

*B. Insanity*

In *Shannon v. United States*,[256] the defendant, a convicted felon, was stopped by a police officer on a street in Tupelo, Mississippi and was asked to accompany the officer to the station house to speak with a detective. After telling the officer that he did not want to live anymore, the defendant walked across the street, pulled a pistol from his coat, and shot himself in the chest.[257]

253. *Victor*, 114 S. Ct. at 1254 (Blackmun, J., concurring in part and dissenting in part).

254. 637 So. 2d 398 (La. 1994).

255. *Id.* at 403.

256. 114 S. Ct. 2419 (1994).

257. *Id.* at 2423.

The defendant survived, perhaps unhappily, to face prosecution for unlawfully possessing a firearm by a felon. He invoked the insanity defense at trial and requested that the jury be told that a "not guilty by reason of insanity" verdict would result in his involuntary commitment.[258] The trial court refused and instructed the jury to apply the law notwithstanding the consequences and to ignore the defendant's punishment in its deliberations.[259] The defendant was found guilty and on appeal the Fifth Circuit upheld the trial judge's refusal to charge as the defense requested.[260]

Writing for a seven-to-two majority, Justice Thomas held that in general a federal jury "does not require an instruction concerning the consequences of an NGI [not guilty by reason of insanity] verdict, and that such an instruction is not to be given as a matter of general practice . . . ."[261] Such an instruction is not required either by the 1984 Insanity Defense Reform Act [hereinafter IDRA][262] or as a matter of general federal practice. The Court noted that such an instruction would be appropriate only in limited circumstances, such as the injection into the trial of an inaccurate statement as to the consequences of an NGI verdict.[263]

Justice Thomas first reviewed the history of IDRA and developments subsequent to its enactment. Before the Act was passed by Congress in 1984, there had been no NGI verdict in the federal courts.[264] With the exception of the District of Columbia,

258. *Id.*

259. *Id.* The trial judge specifically instructed the jury "'to apply the law as [instructed] regardless of the consequence,'" and that "'punishment . . . should not enter your consideration or discussion.'" *Id.* (citation omitted).

260. *See* United States v. Shannon, 981 F.2d 759 (5th Cir. 1993), *aff'd,* 114 S. Ct. 2419 (1994).

261. *Shannon,* 114 S. Ct. at 2428.

262. 18 U.S.C. § 4241 (1984).

263. *See Shannon,* 114 S. Ct. at 2428; *see also* United States v. Fisher, 10 F.3d 115, 121 (3d Cir. 1993) (holding that instruction to the jury concerning the consequences of a "not guilty by reason of insanity" verdict should be made "in the sound discretion of the trial judge").

264. *Shannon,* 114 S. Ct. at 2422.

there was no commitment procedure for federal defendants acquitted by reason of insanity.[265]

Justice Thomas explained that Congress undertook a "comprehensive overhaul" of the insanity defense, which was prompted in part by the insanity acquittal of John Hinckley for the attempted assassination of President Reagan.[266] The statute, IDRA, codified the insanity defense and established a comprehensive civil commitment procedure for defendants found not guilty by reason of insanity.[267]

The Act's only mention of jury instructions is its list of the three possible verdicts a jury may return when the insanity defense is raised.[268] The statutory text, Justice Thomas noted, "gives no indication that jurors are to be instructed regarding the consequences of an NGI verdict" and thus provides no support for the defendant's argument that such instruction is required.[269]

Shannon also argued that Congress intended to copy the court-prescribed procedures followed in the District of Columbia under a local statute. Justice Thomas rejected this argument, stating that "although Congress may have had the D.C. law in mind when it passed the IDRA," the two statutes have enough significant differences, including issues such as burden of proof, release standards, and the standard for insanity, to refute Shannon's argument that Congress "borrowed" the local law's terms.[270] Thomas noted also that the D.C. rule on jury instructions in insanity cases is not even a statutory matter; therefore, the rule of construction pressed by Shannon was inapplicable.[271]

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265. *Id.* Federal courts generally disapproved telling juries about the consequences of an acquittal by reason of insanity; partly because those consequences were uncertain, and partly because such an instruction would be out of step with the general rule that a verdict should be based strictly on the evidence. *Id.* at 2422-23.

266. *Id.* at 2423.

267. 18 U.S.C. § 4243 (1984).

268. 18 U.S.C. § 4242(b). Section 4242(b) states in pertinent part that: "The jury shall be instructed to find . . . the defendant (1) guilty; (2) not guilty; or (3) not guilty by reason of insanity." *Id.*

269. *Shannon*, 114 S. Ct. at 2425.

270. *Id.* at 2425-26.

271. *Id.* at 2426 n.8.

Justice Thomas also refused to invoke the Court's supervisory power to require instructions on the consequences of an NGI verdict. He rejected Shannon's argument that an instruction is needed to counter the mistaken impression jurors might have that an insanity acquittee will be immediately released into society.[272] He doubted that many jurors are so misinformed, particularly in the aftermath of John Hinckley.[273] Thomas also noted that the instructions given to the jury instructed them to ignore such considerations and that the potential for releasing a dangerous person is no more difficult to ignore when it results from an insanity acquittal than when it results from a failure of the government "to meet its burden of proof at trial."[274]

Justice Thomas observed further that the requested instruction could be counterproductive and actually be to the defendant's disadvantage. The IDRA does not necessarily ensure that an insanity acquittee will be in custody very long, so an accurate instruction about the commitment procedure would not provide much reassurance.[275]

Justice Thomas also believed that the logic of Shannon's position had no obvious stopping place. Jurors may come to their task misinformed on other matters, including parole or the sentences for lesser included offenses. Courts, he argued, would be hard pressed to resist requests for instructions on these issues, if Shannon were granted his request.[276]

Justice Stevens, joined by Justice Blackmun, dissented, stating that "[a] rule that has minimized the risk of injustice for almost 40 years should not be abandoned without good reason."[277] He

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272. *Id.* at 2427.

273. *Id.* at 2427 n.10.

274. *Id.* at 2427.

275. *Id.* Justice Thomas noted that "[i]nstead of encouraging a juror to return an NGI verdict, as Shannon predicts, such information might have the opposite effect -- that is, a juror might vote to convict in order to eliminate the possibility that a dangerous defendant could be released after 40 days or less." *Id.* at 2427-28. Whether the instruction would help or hurt a defendant, an "inevitable result . . . would be to draw the jury's attention toward the very thing--the possible consequences of its verdict--it should ignore." *Id.* at 2428.

276. *Id.*

277. *Id.* at 2428-29 (Stevens, J., dissenting).

pointed out that in *Lyles v. United States*,[278] the D.C. Circuit, *en banc*, was deciding a case under the District of Columbia's then unique automatic commitment. In an opinion co-authored by the then Judge Warren Burger, the court explained that despite the doctrine "that the jury has no concern with the consequences of a verdict . . . [w]e think that doctrine does not apply in the problem before us."[279] Now that IDRA established a civil commitment process for the entire federal system, the basis for the *Lyles* holding was now applicable to all federal courts, Stevens argued.[280] It was clear to Stevens that "[t]he Act's legislative history unmistakably demonstrates that the Act's sponsors assumed that the *Lyles* precedent would thereafter be followed nationwide."[281]

Justice Stevens also disputed the majority's perception that contemporary jurors are more familiar with the consequences of an NGI verdict than they were in 1957 when *Lyles* was decided. He referred to a very recent study which concluded that "'the public overestimates the extent to which insanity acquittees are released upon acquittal and underestimates the extent to which they are hospitalized as well as the length of confinement of insanity acquittees who are sent to mental hospitals.'"[282] Justice Stevens noted further that a growing number of states that have considered the question endorse the commitment instruction as does the American Bar Association.[283]

On the issue of what jurors know, I believe that Justice Stevens has the better of the argument. I doubt very much whether the average person has much recollection of the *Hinckley* case and the manner in which it was resolved. If a goodly number of my own students do not even know who John Hinckley is, I would be hesitant to assume that the general public's knowledge is in greater estate. However, on the statutory history question, the majority may not be unreasonable in its view that Congress did not clearly

278. 254 F.2d 725 (D.C. Cir. 1957) (en banc), *cert. denied*, 356 U.S. 961 (1958).

279. *Id.* at 728.

280. *Shannon*, 114 S. Ct. at 2429 (Stevens, J., dissenting).

281. *Id.* (Stevens, J., dissenting).

282. *Id.* at 2430 (Stevens, J., dissenting) (citation omitted).

283. *Shannon*, 114 S. Ct. at 2431 (Stevens, J., dissenting).

intend to carry into IDRA the judicial gloss which *Lyles* put on the local statute in 1957.

## VI. GUILTY KNOWLEDGE

This Term also saw an unusual number of criminal intent issues. In three cases, the Court had to construe several federal criminal statutes with regard to the level of knowledge required to support a conviction.

In *Ratzlaf v. United States*,[284] the Court held that in order to convict a defendant of "willfully" structuring a currency transaction for the purpose of avoiding a financial institution's requirement to file a Currency Transaction Report, the government must prove that the defendant acted with the knowledge that his or her conduct was unlawful.[285]

In *Staples v. United States*,[286] the Court held that under the National Firearms Act, the government had to prove beyond a reasonable doubt that the defendant knew the weapon he possessed had the characteristics that brought it within the statutory definition of a machine gun.[287]

In *Posters 'N' Things, Ltd. v. United States*,[288] the Court held that the Mail Order Drug Paraphernalia Control Act[289] did not require the government to prove that the defendant had specific knowledge that an item qualify as drug paraphernalia, but rather that the defendant knew the items being sold were likely to be used with drugs.[290]

Of the three cases, *Ratzlaf* is arguably the most significant and surprising, especially in light of the facts of the case. Ratzlaf ran up a debt of $160,000 at the High Sierra Casino in Reno and was

284. 114 S. Ct. 655 (1994).

285. *Id.* at 663. The Court stated that it was not sufficient that the defendant's purpose was to *circumvent* a bank's reporting requirement. *Id.*

286. 114 S. Ct. 1793 (1994).

287. *Id.* at 1804.

288. 114 S. Ct. 1747 (1994).

289. 21 U.S.C. § 857(a). Section 857(a) provides that "[i]t is unlawful for any person (1) to make use of the services of the Postal Service or other interstate conveyance as part of a scheme to sell drug paraphernalia." *Id.*

290. *Posters 'N' Things, Ltd.*, 114 S. Ct. at 1751.

given a week to pay up.[291] He subsequently appeared at the casino with $100,000 but a casino official told him that all transactions involving more than $10,000 in cash had to be reported to state authorities. However, the official also informed him that the casino could accept a cashier's check for the full amount without having to report it. Ratzlaf was further informed that banks, as well, are required to report cash transactions in excess of $10,000. Ensconced in a limousine provided by the casino, and accompanied by a casino employee, Ratzlaf visited a number of banks, each time buying a cashier's check for less than $10,000, which he then delivered to the casino.[292]

Ratzlaf was indicted for "structuring transactions to evade the banks' obligation to report cash transactions" in excess of $10,000,[293] in violation of 31 U.S.C. § § 5324(3)[294] and 5322(a).[295] The trial judge charged the jury that the government had to prove Ratzlaf knew of the banks' reporting obligation and his attempt to evade that obligation but that the government did not have to prove that Ratzlaf knew the structuring was unlawful.[296] On appeal, Ratzlaf argued that for him to be convicted of "willful" conduct, "the Government must prove he was aware of the illegality of the 'structuring' in which he engaged."[297]

Writing for a bare majority, Justice Ginsburg agreed with Ratzlaf's argument. She stated that the willfulness requirement in section 5322(a) is not meaningless.[298] Justice Ginsburg explained

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291. *Ratzlaf*, 114 S. Ct. at 657.

292. *Id.*

293. *Id.*

294. 31 U.S.C. § 5324(3) (1992). Section 5324(3) provides: "No person shall for the purpose of evading the reporting requirements of Section 5313(a) with respect to such transaction -- . . . (3) structure or assist in structuring, or attempt to structure or assist in structuring, any transaction with one or more domestic financial institutions." *Id.*

295. 31 U.S.C. § 5322(a) (1992). Section 5322(a) reads: "A person willfully violating this subchapter or a regulation prescribed under this subchapter . . . shall be fined not more than $250,000, or imprisoned for not more than five years, or both." *Id.*

296. *Ratzlaf*, 114 S. Ct. at 657.

297. *Id.*

298. *Id.* at 659.

that section 5322(a) is used to criminalize other provisions of the regulatory scheme apart from the anti-structuring provision, and that in those instances, courts have consistently read it "to require both 'knowledge of the reporting requirement' *and* a 'specific intent to commit the crime,' *i.e.*, 'a purpose to disobey the law.'"[299]

The government argued that structuring cash transactions is not the sort of thing a person does innocently and that it is therefore reasonable to impose criminal liability on a structurer without proving that he knew structuring to be illegal.[300] Justice Ginsburg replied that "currency structuring is not inevitably nefarious" and gave as examples persons who wish to prevent banks from filing reports to deflect IRS audits or to hide assets from former spouses.[301] Finally, Justice Ginsburg did not believe that in so construing the statute, the majority was abandoning the principle that "ignorance of the law is no defense to a criminal charge."[302]

Justice Blackmun dissented and was joined by Chief Justice Rehnquist and Justices O'Connor and Thomas--unusual bedfellows for him. He argued that the majority's reasoning is not justified by the statutory text or consistent with precedent[303] and that it further "largely nullifies the effect" of the anti-structuring provision by "mak[ing] prosecution for structuring difficult or impossible in most cases."[304] Justice Blackmun did not believe that a less stringent willfulness element, embraced by the majority, would be likely to ensnare innocent people.[305] "As a result of today's

299. *Id.*

300. *Id.* at 660. The government argued "that § 5324 violators, by their very conduct, exhibit a purpose to do wrong, which suffices to show 'willfulness.'" *Id.*

301. *Id.* at 660-61.

302. *Id.* at 663. Justice Ginsburg maintained that if anything, it is Congress who has deviated from the principle that ignorance of the law is no defense to a criminal charge. *Id.*

303. *Id.* at 667 (Blackmun, J., dissenting).

304. *Id.* at 669-70 (Blackmun, J., dissenting).

305. *Id.* (Blackmun, J., dissenting). Justice Blackmun maintained that "[p]etitioner Ratzlaf, obviously not a person of limited intelligence, was anything but uncomprehending as he traveled from bank to bank converting his

decision," he stated, "Waldemar Ratzlaf--to use an old phrase--will be 'laughing all the way to the bank.'"[306]

A similar issue of criminal intent arose in the *Staples* case. In *Staples*, federal agents seized an AR-15 assault rifle during a search of the defendant's home.[307] The gun appeared to be a semi-automatic, civilian counterpart of the military's fully automatic M-16 rifle.[308] However, when the agents test-fired it, they found it to qualify as a "machinegun" since it fired automatically and not semiautomatically[309] and was thus in violation of the registration requirement under the National Firearms Act.[310] At trial, Staples requested a jury instruction that the statute requires proof beyond a reasonable doubt that he knew the gun would fire automatically.[311] The trial court denied his request and the Tenth Circuit affirmed.

Justice Thomas, writing for himself and four other members of the Court, observed that the concept of *mens rea* is a rule and not an exception to our criminal jurisprudence.[312] Thus, "some indication of congressional intent, express or implied, is required to dispense with *mens rea* as an element of a crime."[313] Justice Thomas rejected the government's argument that *mens rea* does not apply since this case falls into a line of cases termed "public welfare" or "regulatory" offenses whereby strict criminal liability is imposed regardless of the defendant's knowledge of illegality.[314] In rejecting the government's position, Thomas relied on *Liparota v. United States*,[315] in which the Court held that food

bag of cash to cashier's checks in $9,500 bundles." *Id.* at 670 (Blackmun, J., dissenting).

306. *Id.* (Blackmun, J., dissenting).

307. *Staples*, 114 S. Ct. at 1796.

308. *Id.*

309. *Id.*

310. 26 U.S.C. § 5841 (1968). The Act also includes within the term "firearms" a machinegun and further defines a machinegun as "any weapon which shoots . . . or can be readily restored to shoot, automatically, more than one shot, without manual reloading, by a single function of the trigger." 26 U.S.C. § 5845(b) (1968).

311. *Staples*, 114 S. Ct. at 1796.

312. *Id.* at 1797.

313. *Id.*

314. *Id.*

315. 471 U.S. 419 (1985).

stamps are not of such character as to permit dispensing with the *mens rea* requirement that a defendant knew the food stamps he possessed were unauthorized.[316] *Liparota*, Justice Thomas believed, was more applicable than cases such as *United States v. Balint*[317] in which the Court held that the Narcotic Act of 1914 required only proof that a defendant knew he was selling drugs, not that he knew the specific items he sold were actually "narcotics" within the meaning of the Act.[318]

Justice Thomas also rejected the government's reliance on *United States v. Freed*,[319] in which the Court held that, like the narcotics involved in *Balint*, the National Firearms Act does not require proof that a defendant knew the hand grenades he possessed were unregistered.[320] Thomas accused the government of "glossing over the distinction between grenades and guns," and "ignor[ing] the particular care we have taken to avoid construing a statute to dispense with *mens rea* where doing so would 'criminalize a broad range of apparently innocent conduct.'"[321] While firearms are subject to some comprehensive regulation, Thomas pointed out, so were the food stamps in *Liparota*.[322] That guns are potentially dangerous does not, by itself, necessarily alert a person that owning one is probably illegal.

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316. *Id.* at 433.

317. 258 U.S. 250 (1922).

318. *Id.* at 254.

319. 401 U.S. 601 (1971).

320. *Id.* at 609. Justice Thomas, in *Staples*, stated that *Freed* does not address the issue presented in *Staples*. *Staples*, 114 S. Ct. at 1799. *Freed* only concerned the issue of whether the Act required "proof of knowledge that a firearm is *unregistered*." *Id.* The issue in *Staples* was whether the Act "requires the defendant to know of the features that make his weapon a statutory firearm." *Id.* Justice Thomas explained that the two concepts could espouse two different mental states. *Id.*

321. *Id.* at 1799 (citation omitted). Justice Thomas acknowledged that the contrast between hand grenades and guns "is not as stark" as that between hand grenades and food stamps, but "the fact remains that there is a long tradition of widespread lawful gun ownership by private individuals in this country. Such a tradition did not apply to the possession of hand grenades in *Freed* or to the selling of dangerous drugs that we considered in *Balint*." *Id.*

322. *Id.*

## VII. RETROACTIVITY

In *Gerstein v. Pugh*,[323] the Court determined that the Fourth Amendment requires a prompt judicial determination of probable cause as a prerequisite to any extended restraint of liberty after a warrantless arrest.[324] In *County of Riverside v. McLaughlin*,[325] the Court held that a delay of more than forty-eight hours without a judicial determination of probable cause renders a warrantless arrest presumptively unconstitutional and places upon the state the burden of showing that the delay is reasonable.[326] This Term, in *Powell v. Nevada*,[327] the Court held that *McLaughlin* is to be applied retroactively to all cases not yet final at the time *McLaughlin* was decided.[328]

Powell was arrested for child abuse of his girlfriend's four-year-old daughter. Four days elapsed before a magistrate found probable cause to hold him for a preliminary hearing and he was not personally brought before a magistrate until ten days had passed. By that time, the little girl had died and Powell made incriminating statements.[329] The Nevada Supreme Court held that *McLaughlin* did not apply because it was decided after Powell's arrest.[330]

Writing for the Court, Justice Ginsburg held that *Griffith v. Kentucky*,[331] which held that "a new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases,

323. 420 U.S. 103 (1975).

324. *Id.* at 124-25. ("Whatever procedure a State may adopt, it must provide a fair and reliable determination of probable cause as a condition for any significant pretrial restraint of liberty, and this determination must be made by a judicial officer either before or promptly after arrest.").

325. 500 U.S. 44 (1991).

326. *Id.* at 56. The Court, interpreting Gerstein v. Pugh, 420 U.S. 103 (1975), noted that a particular case will not withstand constitutional scrutiny simply because a probable cause determination is provided within forty-eight hours. *Id.* The test will be whether the arrested individual can prove that the delay in the hearing was unreasonable. *Id.*

327. 114 S. Ct. 1280 (1994).

328. *Id.* at 1283.

329. *Id.* at 1282.

330. *See* State v. Powell, 838 P.2d 921, 924 (Nev. 1992) (per curiam).

331. 479 U.S. 314 (1987).

state or federal, pending on direct review or not yet final . . . ,"[332] applies because Powell's conviction was not final when *McLaughlin* was announced.[333]

However, the retroactivity issues were not what divided the Court. The far more difficult issue was the remedy for a *McLaughlin* violation. The Court did not decide this issue and remanded it to the Nevada Supreme Court because that court had not ruled on an applicable remedy.[334] Justice Thomas, joined by Chief Justice Rehnquist, dissented from the decision to remand on the ground that a statement made by an arrestee after the forty-eight hour limit is not a "product" of a *McLaughlin* violation unless "a proper hearing at or before the 48 hour mark would have resulted in a finding of no probable cause."[335]

Recently, the New Jersey Supreme Court ruled on this issue, consistent with Justice Thomas. In *State v. Tucker*,[336] the court noted that it had never followed the Supreme Court's decision in *Mallory v. United States*[337] since *Mallory* was based on the Supreme Court's supervisory powers. The New Jersey Supreme Court had held, instead, that arraignment delay was but one factor bearing on the voluntariness of a statement.[338] The New Jersey Supreme Court agreed with the lower court's determination that the defendant would have remained in lawful custody if a probable cause hearing had been timely held.[339] Consequently, because the defendant's statements were voluntary, the delay in affording him a probable cause determination did not taint his statements.

I think it unlikely that, if called upon to resolve the question, the Court will take a different approach. In recent years, the Court has not been expansive in its rulings on "poisoned fruits." Furthermore, the remedy of suppression may be deemed too severe when the triggering violation is delay in arraignment. Finally, the Court's

332. *Id.* at 328.
333. *Powell*, 114 S. Ct. at 1283.
334. *Id.* at 1284.
335. *Id.* at 1286 (Thomas, J., dissenting).
336. 645 A.2d 111 (N.J. 1993).
337. 345 U.S. 449 (1957).
338. *Tucker*, 645 A.2d at 117.
339. *Id.* at 118.

rejection of a twenty-four hour limitation in *McLaughlin*, which most lower courts deemed an appropriate boundary for arraignment delay, signaled a rather tepid desire on the Court's part to affect state and local practices that have long subjected arrestees to arraignment delay.[340]

## VIII. EVIDENCE/STATEMENTS AGAINST PENAL INTEREST

In *Williamson v. United States*,[341] the Court surprised more than a few when it held that Federal Rule of Evidence 804(b)(3),[342] the hearsay exception for statements against penal interest, does not allow for admission of non-self-inculpatory portions of a third person's out-of-court confession, even when the statements are part of a narrative whose overall thrust is self-inculpatory.[343] This case ultimately turned on the meaning of the word "statement."

Reginald Harris, stopped in his rental car by a deputy sheriff for reckless driving, consented to a search of his car, in which nineteen kilograms of cocaine in two suitcases in the trunk were discovered. Harris, then arrested, was informed that any cooperation may be helpful to him. He was then interviewed by a DEA agent at which time Harris admitted that it was a Cuban who gave him the cocaine for delivery. However, when the agent proposed a controlled

340. *See* William E. Hellerstein, *The Fourth, Fifth and Sixth Amendments: The Supreme Court's Major Search and Seizure, Interrogation, and Criminal Jury Selection Decisions During the 1990 Term*, 9 TOURO L. REV. 39, 61-63 (1992).

341. 114 S. Ct. 2431 (1994).

342. FED. R. EVID. 804(b)(3). Rule 804(b)(3) states:

> A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in the declarant's position would not have made the statement unless believing it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.

*Id.*

343. *Williamson*, 114 S. Ct. at 2435.

delivery, Harris changed his story, admitted to working for Williamson, and explained that a controlled delivery would be fruitless because Williamson was aware of his arrest.[344]

At Williamson's trial, Harris invoked the Fifth Amendment and, despite a grant of use immunity, refused to testify.[345] The trial judge, citing Rule 804(b)(3), ruled that Harris' statements were admissible since they were made against Harris' penal interest; Harris was unavailable and there were sufficient corroborating circumstances to ensure their trustworthiness.[346] The Eleventh Circuit affirmed Williamson's conviction without opinion.[347]

Justice O'Connor wrote the main opinion and chose to give the word "statement" espoused in Rule 804(b)(3) a narrow reading because the principle behind the rule dictated a conservative approach.[348] The principle, she pointed out, is the "commonsense notion that reasonable people, even [those] who are not especially honest, tend not to make self-inculpatory statements unless they believe them to be true."[349] Justice O'Connor also stated that "[t]he fact that a person is making a broadly self-inculpatory statement does not make more credible the statement's non-self-inculpatory parts."[350] Nor does it make the neutral statements more reliable.[351]

Justice O'Connor pointed out that Harris' statement was mixed, and those portions that inculpated Williamson tended to minimize Harris' own role in the conspiracy.[352] Also, she noted, the changes in Harris' story cast doubt on his collateral statements.[353]

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344. *Id.* at 2433.

345. *Id.* at 2434.

346. *Id.*

347. United States v. Williamson, 981 F.2d 1262 (11th Cir. 1992), *aff'd* 114 S. Ct. 2431 (1994).

348. *Williamson*, 114 S. Ct. at 2435.

349. *Id.*

350. *Id.*

351. *Id.* ("One of the most effective ways to lie is to mix falsehood with truth, especially truth that seems particularly persuasive because of its self-inculpatory nature.").

352. *Id.* at 2435.

353. *Id.* Justice O'Connor reasoned that:

Therefore, she concluded, a trial court "may not just assume . . . that a statement is self-inculpatory because it is part of a fuller confession. . . ."[354]

Justice O'Connor disagreed with Justice Kennedy's view that the Advisory Committee Notes to the rule dictated the broader reading of "statement." She did not read the notes to clearly indicate that the committee intended to allow the admission of out-of-court statements that are not directly inculpatory.[355] Justice O'Connor also observed that even under her narrow reading of the rule, there would be circumstances in which the rule would render admissible statements inculpating another. But whether a statement is self-inculpatory could be determined only by viewing it in context.[356]

Justice Scalia concurred, primarily to dispute Justice Kennedy's concern that the majority's narrow reading of "statement" eviscerates the hearsay exception for statements against penal interest.[357] He put forth a number of hypotheticals in support of his position that the mere fact that a third party's statement mentions or implicates other people by name will not make it inadmissible under Rule 804(b)(3) so long as it remains self-inculpatory.[358]

Justice Ginsburg, joined by Justices Blackmun, Stevens, and Souter, disagreed only with Justice O'Connor's application of Rule 804(b)(3) to Harris' statements. She believed that none of his statements, even the self-inculpatory ones, should have been admitted because they were so intertwined with other statements

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> [W]hen part of the confession is actually self-exculpatory, the generalization on which Rule 804(b)(3) is founded becomes even less applicable. Self-exculpatory statements are exactly the ones which people are most likely to make even when they are false; and mere proximity to other, self-inculpatory, statements does not increase the plausibility of the self-exculpatory statements.

*Id.*

354. *Id.*
355. *Id.*
356. *Id.*
357. *Id.* at 2438 (Scalia, J., concurring).
358. *Id.* (Scalia, J., concurring).

designed to shift the blame to Williamson that none were sufficiently trustworthy to be admitted under Rule 804(b)(3).[359]

Justice Kennedy, joined by Chief Justice Rehnquist and Justice Thomas, thought the broader reading of "statement" was mandated by the Advisory Committee Notes, the common law, and "the general presumption that Congress does not enact statutes that have almost no effect."[360] Thus, he concluded that all statements related to the declarant's precise statement against interest should be admitted, subject to only two exceptions: excluding collateral statements that are so self-serving as to be unreliable, and, "in cases where the statement was made under circumstances where it is likely that the declarant had a significant motivation to obtain favorable treatment," the entire statement should be inadmissible.[361]

The government has good reason to be upset by the *Williamson* ruling. Many circuit courts, including the Second Circuit, had previously read Rule 804(b)(3) broadly to allow collateral statements into evidence that were not themselves self-inculpatory when they were part of a narrative confession.[362] While Justice Scalia may be correct in pointing out that the penal interest exception has not been "eviscerated," as Justice Kennedy believes, because third-party statements may still, in certain circumstances, be admissible against the defendant, it seems clear that a substantial universe of admissibility has been excised. This is not the course the Court has generally chosen when it has ruled on the scope of other federal evidentiary rules.

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359. *Id.* at 2439 (Ginsburg, J., concurring). Justice Ginsburg noted that Harris' statements which were self-incriminating were only marginal evidence of his guilt. *Id.* (Ginsburg, J., concurring). "They project an image of a person acting not against his penal interest, but striving mightily to shift principal responsibility to someone else." *Id.* at 2439-40 (Ginsburg, J., concurring).

360. *Id.* at 2442 (Kennedy, J., concurring).

361. *Id.* at 2445 (Kennedy, J., concurring).

362. *See* United States v. Cruz, 797 F.2d 90, 97 (2d Cir. 1986); United States v. Garris, 616 F.2d 626, 630-33 (2d Cir.), *cert. denied*, 447 U.S. 926 (1980); *see also* United States v. York, 933 F.2d 1343, 1364-65 (7th Cir.), *cert. denied*, 112 S. Ct. 321 (1991); United States v. Alvarez, 584 F.2d 694, 699-702 (5th Cir. 1978); United States v. Barrett, 539 F.2d 244, 251-53 (1st Cir. 1976).

## IX. GENDER-BASED PEREMPTORY CHALLENGES

Last, but certainly not least, is the Court's decision in *J.E.B v. Alabama*,[363] which held that peremptory challenges based on gender violate the Equal Protection Clause.[364] I include it in my discussion today because there can be little doubt that *J.E.B.*, although a civil case, governs criminal cases as well.

This was a paternity suit brought by the state on behalf of the mother against the putative father.[365] One-third of the jury panel was male but the state used nine of its ten peremptory challenges to strike males.[366] The defendant eventually used all but one of his strikes to remove male jurors and the result was an all-female jury.[367] The defendant argued that *Batson v. Kentucky*[368] should be extended to gender-based peremptories, an argument that met with no success in the Alabama courts.[369] In the Supreme Court, he fared much better.

Justice Blackmun, writing for five justices, traced the history of the exclusion of women from jury service, and catalogued the reasons that allowed it until the Court, in *Taylor v. Louisiana*,[370] held that a criminal defendant's Sixth Amendment right to a jury trial is violated by such a practice.[371] Observing that *Taylor* "is consistent with the heightened equal protection scrutiny"[372] that the Court has applied to gender-based classifications since 1971, Justice Blackmun had little difficulty fitting gender-based peremptories under the equal protection principles of *Batson*. He rejected the argument that while race-based discrimination is

363. 114 S. Ct. 1419 (1994).
364. *Id.* at 1421.
365. *Id.*
366. *Id.* at 1422.
367. *Id.*
368. 476 U.S. 79 (1986) (ruling that peremptory challenges based on race violate Equal Protection Clause).
369. *J.E.B.*, 114 S. Ct. at 1424.
370. 419 U.S. 522 (1975).
371. *Id.* at 530. ("Restricting jury service to only special groups or excluding identifiable segments playing major roles in the community cannot be squared with the constitutional concept of jury trial.").
372. *J.E.B.*, 114 S. Ct. at 1424.

unacceptable in the courtroom, gender-based discrimination is not, emphasizing that the history of total exclusion from juries suffered by women was not different from that suffered by African-Americans.[373]

Given the heightened scrutiny which is applicable to gender-based distinctions, the "only question," Justice Blackmun said, "is whether discrimination on the basis of gender in jury selection substantially furthers the state's legitimate interest in achieving a fair and impartial trial."[374] He concluded it did not. He pointed out that the state "offer[ed] virtually no support for the conclusion that gender alone is an accurate predictor of juror's attitudes,"[375] and that the state's reasons for permitting the exclusion of males was based upon "stereotypes" and "gross generalizations" that would be deemed improper if made on the basis of race.[376] He denied that the Court's ruling implied "the elimination of all peremptory challenges."[377] All it means is that "gender simply may not serve as a proxy for bias."[378]

Justice O'Connor joined Justice Blackmun's opinion yet, in a separate concurrence, she argued that "today's holding should be limited to the *government's* use of gender-based peremptory strikes."[379] However, this is an argument which has already twice been rejected by the Court in *Edmonson v. Leesville Concrete Co., Inc.*,[380] and *Georgia v. McCollum*,[381] with regard to *Batson*'s application to civil and criminal defendants respectively, and shows no signs of life when gender is at issue. She expressed particular concern that in a battered wife trial, the Court's decision would most likely preclude a woman "from using her peremptory

373. *Id.* at 1425.
374. *Id.*
375. *Id.* at 1427.
376. *Id.*
377. *Id.* at 1429.
378. *Id.*
379. *Id.* at 1431 (O'Connor, J., concurring).
380. 500 U.S. 614 (1991) (holding that private civil litigants are state actors when they exercise peremptory challenges).
381. 112 S. Ct. 2348 (1992) (stating that criminal defendants are state actors when they exercise peremptory challenges).

challenges to ensure that the jury of her peers contains as many women members as possible[.]"[382]

Nonetheless, Justice O'Connor agreed that the Court had to do what it did in the case at bar even if the decision meant that "we have added an additional burden to the state and federal trial process, taken a step closer to eliminating the peremptory challenge, and diminished the ability of litigants to act on sometimes accurate gender-based assumptions about juror attitudes."[383]

Justice Kennedy concurred only in the judgment, emphasizing that the harm flowing from the exercise of peremptories based on group characteristics "is to personal dignity and to the individual's right to participate in the political process."[384]

Chief Justice Rehnquist dissented, arguing that peremptory challenges based on sex do not rise to the same level of invidiousness as those based on race and that *Batson* "is best understood as a recognition that race lies at the core of the commands of the Fourteenth Amendment."[385]

The angriest dissent was penned by Justice Scalia and was joined by Chief Justice Rehnquist and Justice Thomas. Scalia accused the majority essentially of writing a "politically correct" decision in that they were acting "not to eliminate any real denial of equal protection, but simply to pay conspicuous obeisance to the equality of the sexes. . . ."[386] Calling most of the majority's opinion "quite irrelevant to the case at hand,"[387] Scalia accused the majority of reaching its conclusion by "focusing unrealistically upon individual exercise of the peremptory challenge, and ignoring the totality of the practice."[388] The system "as a whole is even-handed," he argued since all groups are equally subject to

382. *J.E.B.*, 114 S. Ct. at 1433 (O'Connor, J., concurring).
383. *Id.* at 1432 (O'Connor, J., concurring).
384. *Id.* at 1434 (Kennedy, J., concurring).
385. *Id.* at 1435 (Rehnquist, C.J., dissenting).
386. *Id.* at 1439 (Scalia, J., dissenting).
387. *Id.* at 1436 (Scalia, J., dissenting).
388. *Id.* at 1437 (Scalia, J., dissenting).

peremptories, as well-evidenced by the petitioner's use of his peremptories to strike women from the jury.[389]

The decision in *J.E.B.* has generated considerable criticism and I am sure more will come. The major grievances that have been voiced are that it is analytically unsound, ends-oriented, and manifests more of a desire to be in vogue than to engage in principled decision-making. And it is not to Rush Limbaugh that I am referring.

Professor Linda S. Mullenix has written that "Justice Blackmun's decision is obfuscated by rhetoric, perhaps because he has no constitutional peg on which to hang his gender-bias hat."[390] Stuart Taylor, Jr., a highly-respected Supreme Court commentator, is even more vehement, stating that "in striking down sex-based peremptories in *J.E.B. v. Alabama*, the Court used a phony rationale to make bad law."[391]

Taylor argues that the case "had nothing to do with sex discrimination in any meaningful sense," and that, in exercising sex-based peremptories, the lawyers did so "with neither the intent, nor the effect, nor even the appearance of subordinating women to men, or men to women."[392] He attacks as "utter nonsense," and "dishonest" Justice Blackmun's statement that sex-based peremptories "'ratify and perpetuate . . . stereotypes about the relative abilities of men and women, [amounting to] a brand . . . of . . . inferiority.'"[393] Taylor furthermore asserts that "[a]s every member of the Court knows, lawyers' use of peremptories has very little to do with assessing the 'abilities' of prospective jurors, and nothing to do with judgments of 'inferiority' or with the notion that women are less fit than men to serve on juries."[394]

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389. *Id.* (Scalia, J., dissenting).

390. Linda S. Mullenix, *Court Sets New Rules in Key Areas*, NAT'L L.J., Aug. 15, 1994, at C7.

391. Stuart Taylor, Jr., *A Jurisprudence of Gesture*, AM. LAW., Sept. 1994, at 46

392. *Id.*

393. *Id.* (citation omitted).

394. *Id.*

Strong words are these. But I doubt that given the Court's post-*Batson* decisions, any other result was really possible. When the Court held in *Edmondson*, that *Batson* applies in civil cases and when it held in *McCollum*, that defense counsel could not use racially based peremptories, the Court cast its lot, not with the parties, but with the jurors as individuals. Given that emphasis, it seemed unrealistic that sex-based discrimination would take a different path than race-based peremptories.

What of the future? Justice Scalia believes that the Court's ruling "places *all* peremptory strikes based on *any* group characteristics at risk, since they can all be denominated 'stereotypes.'"[395] Thus, strikes based on religion or national origin would also be precluded. Should the Court extend the *Batson* principle to other suspect and even non-suspect classifications, jury impaneling can become even more prolix than it currently is and there may come a movement to abolish peremptories entirely. I would like to think that attorneys and judges will apply a rule of reason in discrete instances and that a sensible balance can be maintained between the elimination of offensive stereotyping and the retention of meaningful peremptories. However, my aspirations do not always do well in reality.

## CONCLUSION

In sum, I feel comfortable characterizing the 1993-94 Term as one in which the seas were "calmer." The Court's workproduct seemed both more pragmatic and less strident and, while there were close votes on a number of key cases, ideological fissures among the Court's members were less prominent. Substantively, the Term was very much a mixed bag. The Court ventured forth again in affording individuals greater protection in civil forfeiture proceedings, trimmed a bit in the confession and sentencing areas, and immersed itself in considerable statutory work. Although strong language was used occasionally by some justices, a greater "lightness of being" seemed to surround a substantial segment of the Court's decisions. This may be explicable, in part, by the

395. *J.E.B.*, 114 S. Ct. at 1438 (Scalia, J., dissenting).

presence of Justice Ginsburg. Apart from the period of adjustment that normally accompanies a new addition to the Court's membership, Justice Ginsburg's personality and collegiality may well have made a special contribution to the Court's mood and tone. I think it fair to conclude that the Court is now embarked on a quest for a new identity, one which certainly will continue through the 1994 Term as Justice Breyer defines his own role in the seat occupied by Justice Blackmun for almost a quarter century.